TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

~~No. 295.~~ 39

THE BOARD OF COMMISSIONERS OF DELAWARE COUNTY, INDIANA, PLAINTIFF IN ERROR,

vs.

THE DIEBOLD SAFE AND LOCK COMPANY, WILLIAM H. MEYERS, AND EDWARD F. MEYERS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

FILED JUNE 26, 1886.

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a Memorandum for the clerk of the U. S. Supreme Court in the case of The Diebold Safe & Lock Company *vs.* The Board of Commissioners of Delaware County, Indiana.

On pages 28 and 29 of the record the clerk has copied the motion to remand the cause to the State court; also on pages 31 to 33 the motion is again copied, and again on pages 36, 37, and 38 the same motion is copied into a special bill of exceptions. In the first two instances where the motion is copied please omit in printing.

On pages 52, 53, 54, 55, and 56 of the record appears the motion for a new trial. The same motion appears in the bill of exceptions at pages 115, 116, 117, 118, and 119. Please omit in printing the first entry.

On pages 57 and 58 appears the motion in arrest of judgment, and the same motion appears on pages 120 and 121. Please omit in printing the first entry.

U. S. Supreme C't.

BOARD OF COMMISSIONERS OF DELAWARE COUNTY
v.
THE DIEBOLD SAFE AND LOCK COMPANY. } No. 927.

We agree that the above may be done as stated.

W. H. CALKINS,
A. C. HARRIS,
For Appellant.
RITTER & RITTER,
Att'ys for Diebold Safe & Lock Co.

b [Endorsed:] Sup. Court U. S. 1886, Oct'r term. No. 927. The Board of Commissioners of Delaware Co., pl'ff in error, *vs.* The Diebold Safe & Lock Co. *et al.* Stipulation to omit portion of record in printing. Office Supreme Court U. S. Filed Jul. 3, 1886. James H. McKenney, clerk.

1 Pleas of the circuit court of the United States for the district of Indiana, begun and holden at the United States court-house in the city of Indianapolis, in said district, on the first Tuesday of November, in the year of our Lord one thousand eight hundred and eighty-five, before the Honorable William A. Woods, judge of the district court of the United States for the district of Indiana and *ex officio* judge of said circuit court.

THE DIEBOLD SAFE AND LOCK COMPANY
vs.
THE BOARD OF COMMISSIONERS OF DELAWARE COUNTY, INDIANA.

Be it remembered that heretofore, to wit, at the November term of said court, on the 21st day of April, 1885, before the Honorable

William A. Woods, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the plaintiff, by Messrs. Ritter and Ritter, its attorneys, and files in this court, by leave, a transcript of all the papers filed and proceedings had in the above-entitled cause in the Delaware circuit court without prejudice to the right of defendant to remand said cause; and said transcript is in the words following, to wit:

2 STATE OF INDIANA, } ss:
Delaware County, }

Pleas before the Honorable Orlando J. Lotz, sole judge of the Delaware circuit court, at a term thereof begun, held, and continued at the court-house, in the city of Muncie, in said county and State, on Monday, the 6th day of April, 1885, in the cause of The Diebold Safe and Lock Co. *vs.* The Board of Commissioners of Delaware County, Indiana, No. 4608.

Be it remembered that heretofore, to wit, on the 18th day of March, 1885, in vacation, the following complaint, transcript, and bond in the above-entitled cause on appeal from the Board of Commissioners of Delaware county, Indiana, was filed in the office of the clerk of the Delaware circuit court in these words, to wit:

(*Complaint.*)

STATE OF INDIANA, } ss:
Delaware County, }

THE DIEBOLD SAFE AND LOCK CO.

vs.

THE BOARD OF COMMISSIONERS OF DELAWARE COUNTY, INDIANA.

3 The Diebold Safe & Lock Co., complaining of defendant, says—

That on the 20th day of January, 1882, the said board of commissioners entered into a written contract with one William A. Meyers and Edward F. Meyers, partners as W. H. Meyers and Son, for the erection and construction by said Meyers and Son of a jail for said county of Delaware, in the city of Muncie, in said county, copy of which said contract is filed herewith and hereof made a part, marked Exhibit "A."

That as a part of said work to be done and materials furnished in the erection and construction of said building under said contract, and set out in the plans and specifications agreed upon and adopted by said board of commissioners, there was, *inter alia*, certain work and labor to be done and materials to be furnished known and described in said plans and specifications, etc., as iron and chrome-steel work; that on the 6th day of March, 1882, in consideration of the mutual agreement and covenants therein contained and other good and valuable considerations, the said Die-

bold Safe and Lock Co. and said W. C. Meyers & Son entered into a written contract, copy of which is filed herewith and
4 hereof made a part, marked Exhibit "B," in which, for good and valuable considerations, said W. H. Meyers and Son assigned to said Diebold Safe and Lock Co. so much of their said contract with the said board of commissioners of Delaware County as related to said iron and chrome-steel work, and it was agreed that said Diebold Safe and Lock Co. should do and perform all said portion of said work and furnish the materials therefor and receive pay therefor from said Board of Commissioners in all things the same as if said contract therefor had been awarded by said board direct to said Diebold Safe and Lock Co. instead of to said Meyers and Son, and that it should be substituted to all the rights of said Meyers and Son under their said contract with the said board of commissioners, so far as it related to said iron and chrome-steel work, and that said Diebold Safe & Lock Co. should receive from said board of commissioners for said work and materials, out of and as part of the sum agreed to be paid said Myers & Son for the erection of said building, the sum of seven thousand seven hundred dollars (7,700.00), and that said board of commissioners should
5 pay so much of the said contract price of said jail to said Diebold Safe & Lock Co. instead of to said Meyers & Son, and that the said Co., and not the said Meyers & Son, should be entitled to receive the same from the said board of commissioners, and that said Meyers & Son assigned to said Diebold Safe & Lock Co. so much of the said agreement of said board of commissioners as related to the payment for said iron and chrome-steel work in said jail, and assigned, sold, and transferred to it so much of its said claim and demand against said board of commissioners and said county of Delaware on account of said contract and the erection and construction of said jail to the extent of said seventy-seven hundred dollars; that said board of commissioners and said county of Delaware had notice of said contract and of said assignment at the time the same was made, and at and before the time said building was erected, and at and before the time that any payments were made to said Meyers and Son on account of said contract or on account of the erection and construction of said
6 jail, and that said contract was entered into and said assignment made with the full knowledge and consent of said board, and that, with the knowledge and consent of said board of commissioners, said Diebold Safe and Lock Co. proceeded, in pursuance of said contract, to do said work and furnish said materials, and did do the said work and furnish all the said materials in all things as agreed by it, and in all things in accordance with the terms and conditions of the said contract between said Meyers and Son and said board of commissioners, and in all things according to the plans and specifications therefor as adopted and agreed upon by said board, and to the acceptance of the architect and superintendent of said building and of said board; that the said work done and materials furnished by said Diebold Safe and Lock Co. were of the reasonable value of said sum, seventy-seven hun-

dred dollars, and that said work was done and said materials furnished by it for and in and upon said jail building, and said materials were all used in the erection and construction of the same, and that said work was done and said materials were furnished therefor by said Diebold Safe and Lock Co. under the said
7 contract, agreement, and assignment and with the full knowledge and consent of said board of commissioners, and that said board had notice and knowledge that it was doing said work and furnishing said materials for said jail under the agreement that it should receive therefor from said board of commissioners the said sum of seventy-seven hundred dollars out of the fund provided for the construction of said jail, and was to receive payment of said work instead of said Meyers and Son.

And says Diebold Safe & Lock Co. says that it has done and performed all the said work and labor and furnished all the said materials in all things as agreed, and that said Meyers and Son have done the rest of the work upon said building, and that the same has been erected and completed in all things and has been accepted by said board; that at and before said work was done and while it was doing said work and furnishing said materials and before any payments were made thereon said board of commissioners had notice of the said assignment of said portion of the said contract to it, and that it was doing the said work and furnishing the said materials, and that it was to receive from said board
8 the compensation therefor, and was to receive out of the said contract price of said jail and in the place of said Meyers & Son the said sum of seven thousand seven hundred dollars.

But it says that said board of commissioners has not paid it any part of said sum of seventy-seven hundred dollars, and has not paid it anything whatever upon or on account of said work, and has not paid or allowed it any sum whatever for said work done and materials furnished by it in the construction of said jail as aforesaid, and has not paid or allowed any part of the sum due under its said contract for said iron and chrome-steel work, though payment has duly been demanded.

That there is now due and owing to it on account of said work and labor done and said materials furnished the said sum of seven thousand seven hundred dollars ($7,700.00), which is past due and wholly unpaid, though payment thereof has heretofore been demanded, and it asks that said sum be allowed and paid to it, and it asks that said board make such allowances, orders, and entries and take such action in the premises as will be or may be necessary to secure the payment of said sum, with interest thereon, to it the said Diebold Safe & Lock Co.

9 Par. 2nd. For a further and second cause of action against said defendant, said plaintiff, The Diebold Safe & Lock Co., says that on the 20th day of January, 1882, the said Board of Commissioners of said Delaware County, Indiana, entered into a written contract with William H. Meyers and Edward F. Meyers, partners under the name and style of W. H. Meyers & Son, for the construction and erection of a jail for said county of Delaware in the city of

Muncie, in said county, by said Meyers and Son, copy of which contract is filed herewith and hereof made a part, marked Exhibit "A."

That in said contract it was provided, *inter alia*, that said board of commissioners should pay to said Meyers and Son, in consideration of the erection and construction of said building in accordance with said contract, the sum of twenty thousand dollars.

That in pursuance thereof said Meyers and Son did erect and cause to be erected said jail building in all things in conformity to said contract and in all things in accordance with the plans and specifications adopted and agreed upon by said board of commissioners, and fully carried out and completed said contract on their
10 part in accordance with the terms thereof, but that said board of commissioners have failed to carry out the same upon their part and to pay the said contract price as therein agreed; that there yet remains due and unpaid thereon the sum of ten thousand dollars which is not past due.

That on the 25th day of November, 1884, the said William H. Meyers and Edward F. Meyers, for a good and valuable consideration, sold, assigned, and transferred to said Diebold Safe and Lock Co. all their claim and demand against said county of Delaware and said board of commissioners on account of the building of said jail and all balance due them from said county or said board of commissioners on account thereof, which said assignment was in writing and a copy of which is filed herewith and made part hereof, marked Exhibit "C."

That there is now due and owing to said Diebold Safe & Lock Co. from said county on account thereof the sum of ten thousand dollars, which is past due and wholly unpaid, though payment thereof has heretofore been demanded; wherefore it prays judgment against it for the said sum of ten thousand dollars.

J. W. RYAN AND RITTER & RITTER,
Att'ys for Diebold Safe & Lock Co.

11 EXHIBIT "B."

FORT WAYNE, IND., *May 6th*, 1882.

We, the Diebold Safe and Lock Company, at Canton, O., hereby agree to construct and place in position in the new jail to be erected in the city of Muncie, Delaware Co., Ind., all of that portion of the work for same (locks included), and described under the head of iron and chrome-steel work in specifications and according to plans delineating them, as already adopted by the Board of County Commissioners of said Co., the same as though the contract for such work had been awarded us direct; the contract price for said work to be seventy-seven hundred dollars ($7,700.00) for above work completed and accepted by the superintendent of the building and the Co. commissioners, to be paid by the said Co. commissioners in monthly estimates, less amount retained according to law and contract between the county commissioners and Wm. H. Meyers & Son, on completion of said work in full, as per amount named in this con-

tract and charged by them against Mess. W. H. Meyers & Son,
12 and in full settlement with them for such iron and chrome-steel work under their contract with the Co. commissioner-, and any questions that may arise on the construction of the work or deviations from the plans and specifications that may arise or be deemed advisable to be arranged and settled wholly between ourselves and the Co. commissioners and the superintendent of the building, and we, the Diebold Safe and Lock Co., in consideration of the acceptance of the foregoing proposition by the said W. H. Meyers and Son, agree to do said work and insure the same in perfect working order according to the terms proposed and to the acceptance of the said architect and Co. commissioners, and in such quantities and time as shall not materially interfere with the completion of said building, and to complete the whole work on or before August 1st, 1882.

DIEBOLD SAFE & LOCK CO.,
Per FRED.

We, the said W. H. Myers & Son named in the foregoing proposition, do hereby accept the same, and agree that the said Diebold Safe & Lock Co. shall do and perform the work and labor and furnish the iron and chrome-steel work for said jail in manner and form as proposed and agreed by them in the foregoing proposition and agreement, and that they shall receive payment therefor as proposed.

Dated Fort Wayne, Ind., Mar. 6th, 1882.

W. H. MEYERS & SON.

13 EXHIBIT "C."

For value received, we hereby sell, assign, transfer, and set over to the Diebold Safe & Lock Company all sum and balance due us from Delaware county, Indiana, on account of labor and materials furnished by us in the construction of the jail building at Muncie, in said county, hereby transferring and vesting in said Diebold Safe & Lock Company all rights, claims, and demands of whatsoever nature belonging to us on account of the building of said jail, and intending to release to said company all our interest therein of every kind and description whatsoever.

In witness whereof we have hereunto set our hands and seals this 25th day of November, 1884.

W. H. MEYERS & SON.
WILLIAM H. MEYERS.
EDWARD T. MEYERS.

EXHIBIT "A."

Proposal and Contract.

Articles of agreement entered into this 20th day of January, A. D. eighteen hundred and eighty-two, by and between the Board of Commissioners of Delaware County, Indiana, as party of the first part, and W. H. Meyers and E. T. Meyers, of the city of Fort Wayne,

State of Indiana, as the parties of the second part, witnesseth:

14 First. The said parties of the second part do hereby covenant, promise, and agree to and with the said parties of the first part that they shall and will, for the consideration hereinafter mentioned, on or before the fourth day of September, A. D. 1882, well and sufficiently erect, finish, and deliver in a true, perfect, and workmanlike manner the jail building for the party of the first part, to be known as Delaware county jail, in the city of Muncie, Indiana, agreeably to the plans, drawings, and specifications prepared for said work by Edgar J. Hodgson, architect, and to the satisfaction and under personal supervision of Edgar J. Hodgson, architect, and the commissioners, and will provide such good, proper, and suitable materials of all kinds whatsoever as shall be proper and sufficient for the finishing and completing of the structure, and all else mentioned in the specifications and drawings signified by the said parties within the time aforesaid for the sum of twenty thousand dollars, $20,000.00.

Second. The said party of the first part does hereby covenant and agree to and with the said parties of the second part that the said party of the first part will and shall, in consideration of the covenants and agreements being strictly kept, executed, and per-

15 formed by the said parties of the second part as specified, well and truly pay or cause to be paid unto the parties of the second part twenty thousand ($20,000.00) dollars, lawful money of the United States of America, in the manner following: Payment on the certificate of the architect every thirty days. Twenty per cent. will be retained at each payment and paid on the completion and acceptance of the building by the commissioners and the architect: Provided, That in each case of payment a certificate be obtained from the architect and signed by him to the effect that the work is done in accordance with the drawings and specifications, and that he considers the payment properly due, and provided the commissioners concur with the architect in said certificate, said certificate, however, in no way less-ing the total and final responsibility of the parties of the second part: And further provided, That the parties of the second part shall provide acceptable bond in the sum of ten thousand ($10,000.00) dollars to insure the carrying out of this agreement, said bondsmen to be residents freeholder- of the State; and it is hereby agreed by and between the said parties—

16 Third. That the specifications and the drawings are intended to co-operate so that any work exhibited in the drawings and not mentioned in the specifications, or *vice versa*, are to be executed the same as if they were mentioned in both, to the true intent and meaning of the drawings and specifications without extra charge.

Fourth. Should the county commissioners at any time during the progress of the work require additions to or deductions from or alterations in the said contract they shall have the power to make such additions, deductions, or alterations, and the same shall in no way injuriously affect the contract, but the amount shall be added

to or deducted from the contract by a fair and full valuation, or in case of failure to agree by said parties by arbitration.

Fifth. Should any dispute arise respecting the true construction or meaning of the drawing or specification the same shall be decided by the commissioners and their architect, and their decision shall be full and conclusive.

Sixth. No work shall be considered extra unless a separate estimate in writing for the same shall have been submitted by the contractor to the architect and the commissioners and their signatures obtained thereto before said extra work be done.

17 Seventh. The county will not in any manner be answerable to or accountable for any loss or damages that may happen in or to said works or any part or parts thereof, respectively, or for any of the materials or other things used and employed in finishing and completing the said works.

Eighth. Should the contractor fail to finish the work on or before the time agreed upon they shall pay to the party of the first part the sum of twenty-five dollars *per diem* for each and every day thereafter the said works shall remain unfinished as and for liquidated damages.

In witness whereof the said parties have hereunto set their hands and affixed their seals the day and year above written.

SAMUEL DAVIS, [SEAL.]
WM. F. WATSON, [SEAL.]
BENJ. F. SMITH, [SEAL.]
Board of Commissioners of Delaware County, Ind.,
Parties of the First Part.

WM. H. MEYERS, [SEAL.]
E. F. MEYERS, [SEAL.]
Parties of the Second Part.

(*Transcript.*)

"STATE OF INDIANA, } ss:
Delaware County, }

Be it remembered that on the 4th day of March, 1885, the
18 same being the 3rd day of the regular March term, 1885, of the commissioners' court, before the Honorable Wm. F. Watson, C. E. Jones, & James Barrett, commissioners of said county, the following proceedings were had and entered of record in Commissioners' Record No. 15, page 426, to wit:

In the Matter of the Claim of DIEBOLD SAFE & LOCK CO. for $7,700.

Comes now the Diebold Safe and Lock Company, by John W. Ryan and —— Ritter, their att'ys, and submit their claim, heretofore filed with the auditor, for iron and steel furnished Wm. H. Meyers & Son, contractors, for the construction of the new jail built in Delaware county, State of Indiana. Said claim is for seven thousand seven hundred dollars, $7,700.00, and is in these words and figures (H. I.).

Thereupon comes Wm. Brotherton, on behalf of the board, and the matters of said claim are now for hearing and trial submitted to the board, and the board, after hearing all the evidence and inspecting said cause of action and all things touching the same and being fully advised in the premises, now disallow said claim so made and filed in all things and order that said claim he not paid
19 in whole or in part; to which ruling the said parties at the time object and except.

Be it remembered that afterward, to wit, on the 18th day of March, 1885, the following proceedings were had in said cause and entered of record in the Commissioners' Record No. 15, page 427, to wit:

Filing Appeal Bond.

STATE OF INDIANA, } ss:
Delaware County, }

DIEBOLD SAFE AND LOCK CO.
vs.
BOARD OF COMMISSIONERS DEL. CO.

MARCH 18TH, 1885.

Comes now John W. Ryan, in behalf of the Diebold Safe & Lock Co., and prays an appeal to the circuit court of Delaware county, which appeal is granted upon the filing with the county auditor a good and sufficient bond in the sum of three hundred dollars to the acceptance and approval of the said auditor; and now, at this time, to wit, on the 18th day of March, 1885, came said Diebold Safe and — Company and within the time allowed by law and files the following appeal bond in such case in these words (H. I.), which is by the auditor of said county duly accepted and approved.

STATE OF INDIANA, } ss:
Delaware County, }

20 I, William Dragoo, auditor in and for said county, do hereby certify the above and foregoing to be a true and correct copy of the proceedings and order of the commissioners' court in the above-entitled cause as the same appears of record on file in my office.

Witness my name and the seal of said commissioners' court, at the city of Muncie, the 18th day of March, 1885.

WILLIAM DRAGOO,
Auditor Del. Co."

(*Bond for Appeal.*)

"Know all men by these presents that we, the Diebold Safe and Lock Company and John W. Ryan, are held and firmly bound unto the Board of Commissioners of Delaware County in the penal sum of three hundred dollars, well and truly to be paid, on the following condition:

Whereas on the — day of February, 1885, said Diebold Safe & Lock Company filed with the auditor of said county their certain claim against the county of Delaware in the sum of $7,500, which said sum said board of commissioners, on the — day of February, A. D. 1885, refused to allow and made their order disallowing
21 the same; from which said order said safe and lock company appealed to the circuit court of said county:

Now, if said safe and lock company shall pay such costs and expenses as shall be awarded against her in said cause in said circuit court, then this bond to be void; else to remain in full force.

DIEBOLD SAFE AND LOCK COMPANY, [SEAL.]
By J. W. RYAN, *Ag't & Att'y.*
JOHN W. RYAN. [SEAL.]

Accepted and approved by me this 18th day of March, 1885.
WILLIAM DRAGOO,
Aud. Del. Co."

Be it remembered that afterwards, to wit, on the 8th day of April, 1885, being the 3rd judicial day of the April term, 1885, of the Delaware circuit court, begun, held, and continued at the court-house, in the city of Muncie, on Monday, the 6th day of April, 1885, before the Honorable Orlando J. Lotz, sole judge of said court, the following proceedings were had in said cause and entered of record in said court in these words, to wit:

"Come now the parties, by counsel. Thereupon said plaintiff files her motion and affidavit to transfer this cause to the United States district court of Indiana in these words:

22 STATE OF INDIANA, } ss:
Delaware County, }

In the Circuit Court. April Term, 1885.

THE DIEBOLD SAFE AND LOCK CO.

vs.

THE BOARD OF COMMISSIONERS OF DELAWARE COUNTY, INDIANA.

The said plaintiff states and shows to the court that it is a corporation duly organized and established by the laws of the State of Ohio, having residence and its manufactory and doing business in the city of Canton, in the county of Stark, in the said State of Ohio, and is a citizen and resident of said State, and that said defendant is a citizen and resident of the State of Indiana and of the county of Delaware, in said State.

And said plaintiff now petitions and moves the court to remove the said cause from the circuit court of said Delaware county, in the State of Indiana, to the circuit court of the United States for the district of Indiana for the following reasons, to wit:

That under the laws of the State of Indiana the said defendant,

The Board of Commissioners, could only be sued by a claim
23 filed before the board itself; that said claim was so filed and was disallowed by said board of commissioners and an appeal was taken to this court.

That no proceedings have been taken or had in this court since the said appeal has been taken, nor has said cause been set down for trial or any issues made herein.

That it has reason to believe and does believe that from local influence or prejudice and from both prejudice and local influence it will not be able to obtain justice in this court or in the courts of said State of Indiana.

That such prejudice and local influence preventing plaintiff from getting a fair trial or justice herein has been manifested by said board of commissioners refusing to allow or pay plaintiff the money due to it for said work done, as set out in the complaint, and by paying a portion thereof to one W. H. Meyers and Edward T. Meyers, although it well knew that plaintiff had done and performed all of said iron and chrome-steel work, and that it had an assignment of said portion of said contract with defendant and an assignment of all claims and demands against said board on account of said iron & chrome steel work.

24 That all the citizens of said county are interested in defeating the claim of plaintiff, and have been prejudiced against plaintiff and its claim by defendant asserting that the full contract price for said jail had been paid and that plaintiff is entitled to nothing, whereas, in fact, plaintiff has received nothing for the said work and there is now due and owing to it, on account thereof, more than seven thousand dollars.

That the defendant is the county court of the said county of Delaware, having great local influence, and that any judgement recovered against it would have to be paid by taxes raised by general assessment upon property of the citizens of said county.

Wherefore plaintiff says it cannot have justice in this court on account of local influence and prejudice, and it now files its bond, with sufficient sureties, that it will enter in the said circuit court of the United States for said district, on or before the first day of the next term thereof, copies of all process, pleadings, depositions, testimony, and other proceedings in said cause in any manner affecting the plaintiff or defendant, and that it will there appear and
25 abide all orders of said court made in said cause.

And it asks that this court take no further action herein except such as may be necessary to secure the removal hereof to the said circuit court of the United States, as herein prayed.

DIEBOLD SAFE & LOCK CO.,
By J. W. RYAN, AND
RITTER & RITTER, *Att'ys.*"

"STATE OF OHIO, }
Stark County, } ss:

I, W. W. Clark, being first duly sworn, upon oath say that the matters and facts set forth in the foregoing application and petition

are true; that I am the president, general manager, and agent and attorney for said plaintiff, and that as such and as specially authorized, empowered, and directed by said plaintiff, by order of the directors thereof, made and entered of record in the proper records of said board on the sixth day of April, 1885, I make this affidavit in its behalf for the purpose of securing the removal of said cause to the circuit court of the United States.

And that plaintiff cannot have a fair trial or secure justice in the said circuit court of said Delaware county on account of
26 local influence of the defendant and prejudice against plaintiff and its claim.

W. W. CLARK.

Sworn to before me and signed in my presence by the said W. W. Clark this 6th day of April, 1885.

[SEAL.] JOHN A. ROYER,
Notary Public in and for Stark Co., O."

And also files the following bond and undertaking in these words, to wit:

"STATE OF INDIANA, } ss:
Delaware County, }

In Circuit Court.

DIEBOLD SAFE AND LOCK CO.
vs.
THE BOARD OF COMMISSIONERS OF DELAWARE COUNTY, INDIANA.

We, the undersigned, undertake and agree that the said Diebold Safe and Lock Co., plaintiff in the above-entitled cause, shall file in the circuit court of the United States for the district of Indiana, should said petition and application to remove the same be granted by said Delaware circuit court, where the same is now pending, on or before the first day of the next term of said court, copies of all process, pleadings, depositions, testimony, and other proceedings in said cause concerning or affecting the petitioners herein,
27–32 and in default of said plaintiff so doing or failing to comply with the requirements of the law in such cases made and provided, we agree to pay to the defendants in said cause all damages and costs they may sustain because of such failure.

Witness our hands and seals this sixth day of April, 1885.

DIEBOLD SAFE AND LOCK CO.,
[SEAL.] By W. W. CLARK, *President.*
W. W. CLARK.
L. V. BORKINS.
GEORGE DAUBLE.
D. TYLER.
A. HURFORD.
JOHN W. RYAN.
LEVI RITTER.

Approved in open court this 8th day of April, 1885.

C. J. LOTZ, *Judge.*

And day is given."

STATE OF INDIANA, } ss:
Delaware County, }

I, Geo. F. McCullock, clerk of the circuit court within and for said county, do hereby certify the above and foregoing to be a full, true, correct, and complete copy of the record of the proceedings of said court, and of all the process, pleadings, depositions, testimony, and other papers now on file in the above-entitled cause as the same do now appear of record and on file in said court.

Witness my hand and the seal of said court, hereunto affixed, at the city of Muncie, this 17th day of April, A. D. 1885.

[SEAL.] GEO. F. McCULLOCH, *Clerk.*

(Motion to remand cause omitted in printing, per stipulation.)

33 And afterwards, to wit, at the May term of said court, on the 4th day of June, 1885, before the Honorable William A. Woods, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties, by their respective solicitors, and thereupon the court, being sufficiently advised in the premises, overrules the motion to remand this cause to the State court whence it came.

And afterwards, to wit, at the May term of said court, on the 13th day of June, 1885, before the Honorable William A. Woods, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the defendants, William H. Myers and Edward F. Myers, and enter their appearance and file their answer herein in the words following, to wit:

The defendants in the above-entitled cause, William H. Myers and Edward F. Myers, hereby come and enter their appearance to said action and file their answer thereto as follows, to wit: The defendants, William H. and Edward F. Myers, for answer to the complaint herein, say that it is true that they assigned the con-
34 tract with and debt due from the defendant to the plaintiff as set out in the complaint; that the matters set out therein are true, and that they have no interest in this suit; wherefore they pray judgment for costs.

WILLIAM H. MYERS.
EDWARD F. MYERS.

35 And afterwards, to wit, at the May term of said court, on the 17th day of June, A. D. 1885, before the Honorable William A. Woods, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the defendant, The Board of Commissioners of Delaware County, by Harris & Calkins, its solicitors, and files its demur-er to the bill of complaint herein in the words following, to wit:

Demurrer.

1. The defendant demurs to the first paragraph of the complaint for the reason that it does not state facts sufficient to constitute a cause of action against this defendant.

2. The defendant demurs to the second paragraph of the complaint for the reason that it does not state facts sufficient to constitute a cause of action against this defendant.

3. That the court has no jurisdiction of the subject of the action sued on in the 2nd paragraph of complaint.

WM. BROTHERTON,
HARRIS & CALKINS,
Att'ys for Def't, Del. Co.

36 And afterwards, to wit, at the May term of said court, on the 30th day of June, A. D. 1885, before the Honorable William A. Woods, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties, by their respective solicitors, and thereupon, the court being sufficiently advised, doth now overrule the demur-er to the bill herein; to which ruling of the court the defendant, by its solicitors, now excepts.

And said defendant, The Board of Commissioners of Delaware County, by Harris & Calkins, solicitors, files its bill of exceptions herein in the words following, to wit:

Bill of Exceptions.

Be it remembered that on the 1st day of June, 1885, The Board of Commissioners of Delaware County, defendants herein, filed their written motion to remand this cause to the Delaware circuit court; which motion is in these words, to wit:

The defendant moves the court to remand this cause to the circuit court of *the* Delaware county, Indiana, for the following reasons:

(1.) It appears from the face of the proceedings and from the complaint filed in this cause by the plaintiff that the firm of Myers
37 & Son are residents of the city of Fort Wayne, in this State, and that the said Myers & Son is a firm composed of William H. Meyers and Edward F. Meyers, and that one or both of them are still residents of the city of Fort Wayne, in this State. It further appears by the complaint and exhibits in this cause that said Meyers & Son are assignors of the contract upon which the complaint of the plaintiff is founded.

(2.) It appears on the face of the proceedings in this cause that one W. H. Clark made, signed, and swore to the affidavit asking for the remand- of this cause from the Delaware circuit court into this court, and it appears that said Clark made said affidavit as the president, general manager, agent, and attorney of the plaintiff, but the affidavit recites that he was empowered and directed by an order of the board of directors, entered of record on the records of the cor-

poration, to make the affidavit, but the order so made is not set out, and is therefore insufficient.

3. It appears from the records and proceedings that the transcript in this cause was filed in this court on the 21st day of April, 1885, but that an order allowing or disallowing such transfer was
38 made by the circuit court of Delaware county; that therefore the filing of said transcript was premature and unauthorized.

4. It appears by the record and proceedings in this cause that the first trial on the issues made herein was had pursuant to law before the Board of Commissioners of Delaware county, and that subsequently, after the case had been decided and determined by said board of commissioners, it was appealed by the plaintiff to the circuit court of Delaware county, and that this cause was attempted to be removed into this court after such appeal had been perfected by the plaintiff to the said circuit court of Delaware county.

That therefore the removal of this cause is not within the purview of the statutes of the United States authorizing the removal of causes on account of local prejudice, &c.

Wherefore for these reasons the defendant, The Board of Commissioners of Delaware County, Indiana, moves this court to remand this cause to the circuit court of Delaware county, Indiana.

BROTHERTON, HARRIS & CALKINS,
For Defendant.

39 Be it further remembered that the said motion was submitted to the court, who, after due consideration, overruled said motion to remand and refused to send the cause back to the Delaware circuit court; to which ruling of the court the defendant objected and excepted at the time.

And be it further remembered that afterwards, to wit, on the first day of June, in the year 1885, the said complainant, The Diebold Safe & Lock Company, by leave of court, made new parties defendant to said cause of action, and that it appeared and does appear that said parties, to wit, Wm. H. and Edward F. Meyers, are now and *was* at the time of the commencement of this action residents and citizens of the State of Indiana; that thereupon, leave having first been granted, the said defendants, The Board of Commissioners of Delaware County, refiled their motion to remand said cause to the Delaware circuit court, for the reasons stated in the first clause of their motion hereinbefore set out.

That afterwards, to wit, on the — day of ——, 1885, the said motion having been submitted to the court and after due consideration, the court overruled the said motion and refused to
40 remand the said cause to the State court; to which ruling the said defendant, The Board of Commissioners of Delaware County, objected and excepted at the time.

Whereupon this bill of exceptions is made and signed this 30th day of June, 1885, and is filed and made a part of the record.

WILLIAM A. WOODS.

And afterwards, to wit, at the May term of said court, on the 4th day of August, A. D. 1885, before the Honorable William A. Woods, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the defendant, The Board of Commissioners of Delaware County, by William Brotherton and Harris & Calkins, its solicitors, and files its answer herein in the words following, to wit:

Answer of the Board.

Paragraph 1. The defendant, The Board of Commissioners of Delaware County, for answer to the plaintiffs' complaint, denies each and every material allegation therein set out and contained.

Paragraph 2. The defendant, for answer to the plaintiffs' complaint and to each paragraph thereof, says:

41 That before the commencement of this action, to wit, on the — day of ——, 1884, it fully paid and discharged the debt and obligation of said plaintiffs mentioned and set out in the plaintiffs' complaint.

Paragraph 3. The defendant says that before the commencement of this suit, to wit, on the — day of Sept., 1884, it fully paid off and discharged the obligation in the complaint set out to W. H. Meyers & Son, plaintiffs' assignors, without notice of the pretended assignment of said contract by said assignors to said plaintiffs. Wherefore, &c.

Paragraph 4. For further and fourth answer said defendant says that the contract mentioned and set out in the plaintiffs' complaint between William H. Meyers & Son and said defendant contained, among other things, the following stipulations, to wit:

1. "The parties of the second part do hereby covenant, promise, agree to and with the said party of the first part that they shall and will, for the consideration hereinafter mentioned, on or before the 4th day of September, A. D. 1882, well and sufficiently erect, finish, and deliver, in a true, perfect, and workmanlike man-

42 ner, for the party of the first part —, to be known as the Delaware county jail, in the city of Muncie," etc., etc.

8. "Should the contractor fail to finish the work on or before the time agreed upon they shall pay to the party of the first part the sum of $25.00 *per diem*, for each and every day thereafter the said work shall remain unfinished, as and for liquidated damages."

And the defendant says that the said W. H. Myer & Son, contractors for the building of said jail and the assignors of the plaintiffs, without the consent of the said defendant or its board of commissioners, failed to complete said jail on the 4th day of September, 1882, as by the said contract they agreed to do, and failed to finish and deliver it to the said county for one hundred days thereafter, whereby the said contractors became liable to pay as liquidated damages to said county the said sum of twenty-five dollars per day for the full period of said one hundred days; that the delay in completing and finishing said jail did not arise from any fault on the part of the defendant, and was wholly the default and negligence of the

said Myers & Son, and plaintiffs, his sub-contractors; that
43 afterwards, to wit, on the — day of ——, 1884, and before the assignment of the contract mentioned in said 2d paragraph of complaint, said Myers & Son and the defendant had a settlement of all accounts between them with reference to the building of the said jail and the sum found to be due, after deducting the amount then agreed upon for delays, damages, and the like, under said contract from said balance. The residue *was* then due them — paid by the defendant to the said plaintiffs' assignors. Wherefore, etc.

Paragraph 5. Said defendant, further answering, says that Delaware county is a political corporation, organized under the laws of this State for county purposes; that under section 4246 of the laws of this State, revision of 1881, the board- of commissioners of counties in the State are prohibited from entering into any contracts for the erection of jail buildings until a bond with sufficient surety is filed by the contractors for the faithful performance of the work contemplated. It is further provided by the law of this State that no contract for the building of a jail shall be let without giving notice by publication for at least six weeks in some newspaper of general circulation in the county. It is also provided by the
44 law of this State that all material men — laborers may have an action on the bond filed by the contractors with the county for any work or labor done or material furnished, the same as if such bond was given to such laborer or material man; and the defendant says that it took a good and sufficient bond from said Meyer & Son, duly signed by them, with James Motherwell and William T. Pratt, all of Allen county, Ind., as sureties thereon, for the faithful performance of the work by said Myer & Son, as by law provided, and that a copy of said bond is filed herewith and made a part hereof and marked "Exhibit A;" that before the commencement of this suit the defendant and the said Myer & Son fully settled the account between them, including the value of the work claimed to have been performed by the plaintiffs, and the defendant paid off and discharged the residue found to be due the said Meyer & Son, after deducting damages for delays in the completion of said building and other matters growing out of said contract (long before the defendant had any notice of the assignment by said Myer & Son to the said plaintiffs in said 2nd paragraph of complaint set out); and defendant says that under the law said county could not enter
45 into the contract which it is alleged it entered into in the first paragraph of said plaintiffs' complaint, nor could it lawfully consent or agree to treat the plaintiffs' contract with Myer & Son as an assignment of so much of the contract which said Myer and Son made with said county; that in fact it never did in any way recognize, assent to, or promise to become paymaster to the said plaintiffs; but in all settlements had and payments made said Myer & Son were treated as the only contractors with which the defendants had anything to do, all of which was known to the plaintiffs; that said bond aforesaid remains on file in the auditor's office of Delaware county and is subject at all times to be sued upon by the said

plaintiffs or any other material man or laborer engaged in the construction of said jail; and the defendant says that the said plaintiffs, having full knowledge of all the facts aforesaid, elected to rely alone upon the responsibility of the said Myer & Son and look to them for their pay for doing the work mentioned in the complaint, and on the 30th of June, in the year 1884, in pursuance of such election, they commenced their action against the said Myer &
Son in this court and filed therein a declaration on account
46 and on assumpsit against the said Meyer & Son on the identical items of account covered and set out and sued on in their complaint in this action, which said action against the said Myer & Son is now pending in this court, and is numbered 7819.

Paragraph 6. The defendant says this court has no jurisdiction to try and determine the matters in controversy in this suit, for that the plaintiff is a corporation created by and existing under the laws of the State of Ohio and is a citizen of that State; that the defendants are The Board of Commissioners of Delaware County, Indiana, a citizen of Indiana, and W. H. Meyers & Son was at the time of the removal and commencement of said action in this court and ever since has been and now is a citizen of the State of Michigan, and Edward F. Meyers at said time was and is a citizen of the State of Indiana.

Wherefore this defendant says that this court should not further entertain jurisdiction of this cause.

August 4, 1885.

W. BROTHERTON,
ADDISON C. HARRIS,
WILLIAM H. CALKINS,
Att'ys for Board of Commissioners of Dalaware Co.

47 And afterwards, to wit, at the May term of said court, on the 6th day of August, 1885, before the Honorable William A. Woods, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the plaintiff, by Ritter & Ritter, its attorneys, and files it separate demurrer to the 4th, 5th, and 6th paragraphs of the answer of the defendant, The Board of Commissioners of Delaware County, in the words following, to wit:

The plaintiff demurs separately to the fourth, fifth, and sixth paragraphs of the answer of the defendant, The Board of Commissioners of Delaware County, Indiana, and for cause of demurrer says—

That neither of said paragraphs of said answer states facts sufficient to constitute a cause of defense to said action.

RITTER AND RITTER,
Attorneys for Pl'ff.

And afterwards, to wit, at the May term of said court, on the 10th day of August, 1885, before the Honorable William A. Woods, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

48 Come now the parties, by their respective attorneys, and upon their agreement in open court it is ordered that the above entitled-cause be, and the same is hereby, transferred from the chancery docket of this court to the law docket thereof.

And afterwards, to wit, at the May term of said court, on the 27th day of October, 1885, before the Honorable William A. Woods, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties, by counsel, and thereupon the court, being sufficiently advised, doth now sustain the demurrer to the 4, 5, and 6 paragraphs of answer herein; to which ruling of the court the defendant now excepts.

And afterwards, to wit, at the November term of said court, on the 4th day of November, 1885, before the Honorable William A. Woods, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

49 Comes now the plaintiff, by Ritter & Ritter, its attorneys, and files its reply to the 2d and 3d paragraphs of the answer herein in the words following, to wit:

The said plaintiff, The Diebold Safe and Lock Co., for reply to the second and third paragraphs of the answer of the defendant, The Board of Commissioners of Delaware County, Indiana, says that it denies each and every material allegation in the said paragraphs of answer and each of them contained.

Wherefore it asks judgment as in its complaint demanded.

RITTER & RITTER,
Attorneys for Plaintiff.

50 And afterwards, to wit, at the November term of said court, on the 19th day of January, 1886, before the Honorable William A. Woods, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come now the plaintiffs by counsel, and upon motion it is ordered that the 2d paragraph of complaint in the above-entitled cause be, and the same is hereby, dismissed.

And afterwards, to wit, at the November term of said court, on the 21st day of January, 1886, before the Honorable William A. Woods, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties, the plaintiff by Ritter & Ritter, its attorneys, and the defendant by Harris & Calkins, their attorneys, and the cause now coming on to be tried here comes a jury, to wit, Fitch D. Bowen, Silas Wentz, Thomas J. Rhoads, Francis Wilcox, Hiram B. Cole, Jacob Whitesell, E. W. Davis, Fielding Beeler, Charles Hubbard, Thomas A. Cotton, Levi Moore, and Harvey Resor, who, being duly empanneled and sworn and having partially heard the evidence herein, are by the court allowed to

51 separate until the calling of this cause on to-morrow morning.

And afterwards, to wit, at the November term of said court, on the 22d day of January, 1886, before the Honorable William A. Woods, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come the parties, by their respective attorneys, and the jury heretofore empanneled and sworn herein come also, and, having further heard the evidence herein, are by the court allowed to separate until the calling of this cause on to-morrow morning.

And afterwards, to wit, at the November term of said court, on the 23d day of January, 1886, before the Honorable William A. Woods, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties, by their respective attorneys, and the jury heretofore empanneled and sworn herein come also, and, having heard the residue of the evidence and the argument of counsel and the charge of the court, now retire to their room to consider of their verdict therein.

And afterwards, to wit, at the November term of said court, on the 25th day of January, 1886, before the Honorable William
52–56 A. Woods, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come again the parties, by their respective attorneys, and the jury heretofore empanneled and sworn herein come also, and return into court the verdict following:

We, the jury, find for the plaintiff, and assess his damages at ($8,739.50) eight thousand seven hundred and thirty-nine dollars and fifty cents.

FITCH D. BOWEN, *Foreman.*

And afterwards, to wit, at the November term of said court, on the 4th day of February, 1886, before the Honorable William A. Woods, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the defendants by Harris & Calkins, their attorneys, and file their motion for a new trial herein in the words following, to wit:

(Motion for new trial omitted in printing, per stipulation.)

57 And afterwards, to wit, at the November term of said court, on the 13th day of March, A. D. 1886, before the Honorable William A. Woods, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties, the plaintiff by Ritter and Ritter, its attorneys, and the defendants by Harris and Calkins, their attorneys, and thereupon the court, being sufficiently advised in the premises, doth now overrule the motion of the defendants for a new trial herein; to which ruling of the court the defendants, by their attorneys, now except.

And the defendants now file their motion in arrest of judgement herein in the words following, to wit:

(Motion in arrest of judgment omitted in printing, per stipulation.)

58 And afterwards, to wit, at the November term of said court, on the 15th day of March, 1886, before the Honorable William A. Woods, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties, the plaintiff by Ritter & Ritter, its attorneys, and the defendants by Harris & Calkins, their attorneys; and thereupon the court, being sufficiently advised in the premises,
59 doth now overrule the motion of the defendants in arrest of judgment herein; to which ruling of the court the defendants, by their attorneys, now except.

And afterwards, to wit, at the November term of said court, on the 26th day of March, 1886, before the Honorable William A. Woods, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties, the plaintiff by Ritter & Ritter, its attorneys, and the defendant by Harris & Calkins, its attorneys; and thereupon the plaintiff, by its attorneys, moves the court for judgment upon the verdict of the jury heretofore rendered herein.

It is therefore considered by the court that the plaintiff recover of said defendant said sum of eight thousand seven hundred and thirty-nine dollars and fifty cents ($8,739.50), together with its costs herein expended, taxed at $——.

And thereupon the defendant, by its attorneys, now files its bill of exceptions herein in the words following, to wit:

60 *Bill of Exceptions.*

Be it known that this cause came on for trial in the said circuit court, before the Honorable William A. Woods, district judge, presiding as judge of the circuit court in the absence of the circuit judge, and a jury empanelled and sworn to try said cause upon the issues joined upon the first paragraph of the complaint and the first and second and third paragraphs of answer and the replies thereto, on the 21st day of January, 1886.

That after the attorneys for the respective parties had stated the questions to be tried the said attorneys, before any evidence was introduced, stipulated and agreed as to the citizenship of the parties as follows:

That the plaintiff, The Diebold Safe & Lock Company, is a corporation organized and existing under the laws of the State of Ohio, and is and always had been a citizen of that State; that the defendant, The Board of Commissioners of Delaware County, Indiana, is a municipal corporation organized, created, and existing under the laws of the State of Indiana, and is and always had been a citizen of that State; that on the 20th day of January, 1882, at the time

61 of making the contract between Meyers & Son and The Board of Commissioners of Delaware County, the said William Myers then was and ever since had been and now is a citizen of the State of Michigan, and that the said Edward F. Myers at said time was and ever since had been and now is a citizen of the State of Indiana.

And thereupon the defendant, The Board of Commissioners of Delaware County, Indiana, moved the court to dismiss said cause and proceed no further with the trial for the reason that upon the fact of the citizenship of the parties as aforesaid the court had no jurisdiction to try and entertain said cause; to which motion the court said that that motion would be held under consideration until after the return of the verdict that might be rendered.

And thereupon the trial proceeded; and the plaintiff, to maintain the issue on its part, introduced in evidence the contract above mentioned and entered into between said Myers & Son and the said board of commissioners of said county and the bond given and taken therewith; which contract and bond are in the words and figures following to wit:

Proposal and Contract.

62 Articles of agreement entered into this 20th day of January, A. D. eighteen hundred and eighty-two, by and between the Board of Commissioners of Delaware County, Indiana, as party of the first part, and W. H. Myers and E. F. Myers, of the city of Fort Wayne, State of Indiana, as the parties of the second part, witnesseth:

First. The said parties of the second part do hereby covenant, promise, and agree to and with the said parties of the first part that they shall and will, for the consideration hereinafter mentioned, on or before the fourth day of September, A. D. 1882, well and sufficiently erect, finish, and deliver in a true, perfect, and workmanlike manner the jail building for the party of the first part, to be known as Delaware county jail, in the city of Muncie, Indiana, agreeably to the plans, drawings, and specifications prepared for said work by Edgar J. Hodgson, architect, and to the satisfaction and under the personal supervision of Edgar J. Hodgson, architect, and the commissioners, and will provide such good, proper, and suitable materials of all kinds whatsoever as shall be proper and sufficient for the finishing and completing of the structure and all else mentioned in the specifications and drawings signified by the said parties, within the time aforesaid, for the sum of twenty thousand dollars, $20,000.00.

63 Second. The said party of the first part does hereby covenant and agree to and with the said parties of the second part that the said party of the first part will and shall, in consideration of the covenants and agreements being strictly executed, kept, and performed by the said parties of the second part as specified,

well and truly pay or cause to be paid into the parties of the second part twenty thousand (20,000.00) dollars, lawful money of the United States of America, in the manner following: Payment on the certificate of the architect every thirty days. Twenty per cent. will be retained at each payment and paid on the completion and acceptance of the building by the commissioners and the architect: Provided, That in each case of payment a certificate be obtained from the architect and signed by him to the effect that the work is done in accordance with the drawings and specifications, and that he considers the payment properly due, and provided the commissioners concur with the architect in said certificate, said certificate,
however, in no way less-ing the total and final responsibility
64 of the parties of the second part; and further provided that the parties of the second part shall provide acceptable bond, in the sum of ten thousand dollars ($10,000.00), to insure the carrying out of this agreement, said bondsman to be residents freeholders of the State. And it is hereby agreed by and between the said parties—

Third. That the specifications and the drawings are intended to co-operate, so that any work exhibited in the drawings and not mentioned in the specifications, or *vice versa*, are to be executed the same as if they were mentioned in both, to the true intent and meaning of the drawings and specifications, without extra charge.

Fourth. Should the county commissioners at any time during the progress of the work require additions to or deductions from or alterations in the said contract they shall have the power to make such additions, deductions, or alterations, and the same shall in no way injuriously affect the contract; but the amount shall be added to or deducted from the contract by a fair and full valuation; or, in case of failure to agree by said parties, by arbitration.

Fifth. Should any dispute arise respecting the true con-
65 struction or meaning of the drawing or specification the same shall be decided by the commissioners and their architect, and their decision shall be *full* and conclusive.

Sixth. No work shall be considered extra unless a separate estimate in writing for the same shall have been submitted by the contractor to the architect and the commissioners and their signatures obtained thereto before said extra work be done.

Seventh. The county will not in any manner be answerable or accountable for any loss or damages that may happen in or to said works or any part or parts thereof, respectively, or for any of the materials or other things used or employed in finishing and completing the said works.

Eighth. Should the contractor fail to finish the work on or before the time agreed upon they shall pay to the party of the first part the sum of twenty-five dollars *per diem*, for each and every day thereafter the said works shall remain unfinished, as and for liquidated damages.

In witness whereof the said parties have hereunto set their hands and affixed their seals the day and year above written.

SAMUEL DAVIS, [SEAL.]
WM. F. WATSON, [SEAL.]
BENJ. F. SMITH, [SEAL.]

Board of Commissioners of Delaware County, Ind.,
Parties of the First Part.

WM. H. MYERS, [SEAL.]
E. F. MYERS, [SEAL.]
Parties of the Second Part.

66 Plaintiff then introduced in evidence the contract entered into between the said Myers and Son and the Diebold Safe & Lock Company; which contract is in the words and figures following, to wit:

FORT WAYNE, IND., *May 6th*, 1882.

We, the Diebold Safe and Lock Company, at Canton, O., hereby agree to construct and place in position in the new jail to be erected in the city of Muncie, Delaware Co., Ind., all of that portion of the work for same (locks included) and described under the head of iron and chrome-steel work in specifications and according to plans delineating them as already adopted by the board of county commissioners of said Co., the same as though the said contract for such work had been awarded us direct, the contract price for said work to be seventy-seven hundred dollars ($7,700.00) for above work, completed and accepted by the superintendent of the building and the Co. commissioners, to be paid by the said Co. commissioners in monthly estimates, less amount retained according to law and contract between the county commissioners and Mr. W. H. Myers & Son on completion of said work in full, as per amount named in the contract, and charged by them against Messrs. W. H. Myers &
67 Son and in full settlement with them for such iron and chrome-steel work under their contract with the Co. commissioners, and any questions that may arise on the construction of the work or deviation from the plans and specifications that may arise or be deemed advisable to be arranged and settled wholly between ourselves and the Co. commissioners and the superintendent of the building; and we, the Diebold Safe and Lock Co., in consideration of the acceptance of the foregoing proposition by the said W. H. Myers & Son, agree to do said work and insure the same in perfect working order according to the terms proposed and to the acceptance of the said architect and Co. commissioners, and in such quantities and time as shall not materially interfere with the completion of said building, and to complete the whole work on or before August 1st, 1882.

DIEBOLD SAFE & LOCK CO.,
Per FRED.

We, the said W. H. Myers & Son named in the foregoing proposition, do hereby accept the same and agree that the said Diebold Safe & Lock Co. shall do and perform the work and labor and fur-

nish the iron and chrome-steel work for said jail in manner and form as proposed and agreed by them in the foregoing deposition and agreement, and that they shall receive payment therefor as proposed.

Dated Fort Wayne, Ind., March 6th, 1882.

W. H. MYERS & SON.

68 And thereupon the plaintiff, to further maintain the issue upon its part, introduced competent evidence tending to prove that shortly after the execution of the said contract between Myers & Son and the Diebold Safe & Lock Company, at a time when the defendant was in lawful session, engaged in the transaction of the business of the county, the said defendant was by said Edward F. Myers and John D. Fred (the agent of the said Diebold Safe & Lock Company), orally notified of the existence of said contract between said Myers & Son and said Diebold Safe & Lock Company and of its provisions, and that said board made no objections to such contract or said assignment thereof, which said notice was given before any work had been done or money paid out on account of the construction of said jail, but that on said trial said members of said board of commissioners severally denied in their testimony said oral notice and all knowledge of said assignment, as hereinafter more particularly stated.

That plaintiff further introduced competent evidence tending to prove that thereafter, on the 6th day of December, 1882, during a regular session of said board, but at a time when the
69 same was taking a temporary recess, said John D. Fred, the agent of the said Diebold Safe & Lock Company, filed in the office of the auditor of said Delaware county, Indiana, and with said auditor a written copy of the said contract between said Myers & Son and said Diebold Safe & Lock Company above set out, with a written notice therewith to said board of commissioners that said plaintiff expected to do said portion of the said work therein described, and expected to receive its pay therefor direct from said board of commissioners of said county in the same manner as said Myers & Son would have been entitled to do under their contract with said board of commissioners, and that it would demand from said Board of Commissioners of said Delaware County payment to it (the said plaintiff) of said sum of seven thousand seven hundred dollars out of the contract price agreed to be paid said Myers & Son for the erection and construction of said jails. Said notice was proven by competent testimony to have been lost and oral proof was made by competent testimony of its contents, as above set forth; but that the said auditor and said board of commis-
70 sioners severally denied in their evidence on the trial of the cause all of said statements of said Fred and of said Myers, before mentioned, as hereinafter more particularly stated.

And plaintiff further introduced competent oral testimony of divers witnesses tending to prove that thereafter, in April or May, 1883, the said Board of Commissioners of Delaware County, Indiana, while in lawful session, were by said Fred and others notified orally

of the existence and provisions of said contract between said Myers & Son and the plaintiff, and that said board of commissioners said that it would pay no more money to said Myers & Son upon said jail until the laborers and material men, including said plaintiff, were paid, and that it refused to pay said Myers & Son any more money, and said that the Diebold Safe & Lock Company had filed a claim, and that it (the said board of commissioners) would pay no more money unless it went to the labor and material men, and that, with the amount already drawn by Myers & Son and the plaintiff's claim, there would only be a small amount to be paid Myers & Son; which said notification and conversations were given
71 and had before the plaintiff did the work and furnished the material under the contract; which said several conversations given in evidence by plaintiff's witnesses, tending to show that they had notice of plaintiff's claim under the assignment, were all severally denied by each member of the board of commissioners of said county in their testimony and by the deputy auditor, who was said to be then present; and that at said session said board put one John Parry in charge of said work under the arrangement hereinafter set forth.

That it was established by competent evidence and not denied by the defendant that at said time and at all times prior to April and May, 1883, the said defendant, the said Board of County Commissioners of Delaware County, Indiana, had in the county treasury on hands of the fund provided for the erection of said jail and of the contract price therefor, after deducting all and every payment made on account of said jail, about twelve thousand dollars, not taking into consideration any damages which might enure to said county by reason of the liquidated-damage clause of the
72 Meyer contract, and the value of the work then done did not exceed seven or eight thousand dollars.

That it was established by competent evidence and not denied by defendant that the plaintiff, The Diebold Safe & Lock Company, did and performed all the work and labor and furnished for said jail all the iron and chrome-steel work and all materials agreed by it to be done, performed, or furnished, according to the said contract with Myers and Son and according to the specifications adopted by the said Board of Commissioners of Delaware County and to the acceptance of said board of commissioners, and that the reasonable value of said work and labor done and materials furnished was more than the said sum of seven hundred dollars, but that the same was not furnished within the time mentioned in the Myers contract, and that nothing whatever has ever been received by it therefor, and that nothing whatever has been paid to it or any one in its behalf by said board of commissioners of said county or said Myers & Son or by any other person on account of said work and labor done and materials furnished in, upon, and for said jail,
73 except some inconsiderable sums for freight and the like, but that its said demand remains wholly unpaid.

That plaintiff further introduced competent evidence tending to show that said defendant, the said Board of Commissioners of Dela-

ware County, Indiana, has never paid to said Meyers & Son or to their order or to any person or persons for their benefit or on their account more than the sum of thirteen thousand dollars on said contract or on account of the erection and construction of said jail, and that of the sum paid and included in said amount there was the sum of two hundred and forty-nine dollars paid on account of extra work done upon said jail and not included in said contract. The defendant upon that point introduced competent evidence tending to show that said def't board had paid out on account of the construction of said jail over $18,000.00, and that Edward F. Meyers, one of said firm of Meyers & Son, was present at a settlement with the board of commissioners of said county on September 5th, 1883, hereinafter referred to, whereby it was shown by county orders, issued on account of the construction of said jail, that
74 the sum of about eighteen thousand dollars had been paid on account thereof, and that Edward T. Myers, for said Meyers & Son, consented and agreed to said settlement as correct and accepted the residue shown to be due Meyers & Son on that basis, which was there paid him.

That the said auditor of said Delaware county, being called as a witness for the said plaintiff for the purpose of producing said notice, testified that there was no such notice in his office as that claimed to have been filed by said Fred; and further testified, as a witness for plaintiff and likewise for the defendant, that he had no recollection that any such paper, notice, or writing was in fact ever filed in his office or brought to his knowledge in any manner whatsoever.

And the several members of the board of commissioners of said county testified on behalf of the defendant that none of them had any recollection of having ever seen any such claim as was claimed to have been filed with the auditor, and that neither of them had any knowledge of the said contract or of any claim of said plaintiff until on December 6th, 1883.

But that the deputy auditor of said county testified, as a witness for said defendant, that there was in the auditor's office prior
75 to the said December 6th, 1883, a written claim for seventy-seven hundred dollars presented by said plaintiff on account of said work and contract, and that said claim had been by him returned to plaintiff by order of one of the members of said board; that it further appeared upon the trial of said cause that in the spring of 1883, after the work upon said jail had progressed for some time, but before any of the iron or steel work had been done therein, the said board of commissioners defendant refused to pay any more money to said Meyers & Son upon said jail, but put one John Parry in charge thereof, as its superintendent, under an arrangement that he should pay for materials furnished and work done and expenses incurred in and about the erection of said jail upon written orders drawn upon the county by said Myers & Son, to be approved by said Parry and audited by the said auditor and payed by the treasurer of said county and charged against said Meyers & Son, but that on the trial of said cause said defendant only produced orders to the amount of $784.00 *dollars* given by said Meyers & Son under said

arrangement, and did not produce orders for all sums claimed to have been paid by it under said arrangement.

76 It further appeared that at the time said Parry was placed in charge of said work, as above set forth, the said defendant had only paid out on account of said jail to said Meyers & Son or to any other persons the sum of about eighty-three hundred dollars.

There was also evidence given on the trial of said cause tending to prove that on the 5th day of September, 1883, the jail being then in a forward state of completion, a settlement was had between said Meyers & Son and said board of commissioners defendant, and that as a part of said settlement it was agreed between said county and said Meyers & Son, by Edward T. Meyers, one of said firm, that the sum of forty-five hundred dollars should be taken and considered as the damages sustained by said county for liquidated damages in consequence of delays in the completion of said jail, and should be deducted from the contract price of said jail on account of such delays, as agreed in said contract between said Meyers & Son and said county, and said parties then estimated the amount necessary to finish and complete said jail, and said amount, together with

77 said sum of forty-five hundred dollars taken as liquidated damages as aforesaid, was deducted from said contract price for said jail, and the balance then estimated to be due said Meyers & Son was then paid to them by said county, and said jail was taken off their hands by said board; that the amount actually necessary to complete said jail, together with the said sum of forty-five hundred dollars as aforesaid, was more than the contract price of said jail by two thousand dollars.

That a short time prior to the making of said settlement, to wit, on the 28th day of August, 1883, the said plaintiff had begun the work upon the iron and chrome steel in said jail and was engaged upon such work in said jail at the time of said settlement, and that said work was fully finished and completed on the 24th day of September, 1883.

And it further appeared in evidence that on the same day said settlement was made between said Meyers & Son and said county the said board of commissioners defendant entered into a written stipulation with said Edward F. Meyers, representing said Meyers & Son, to pay to said Meyers & Son the sum of two thousand dollars, part of the rebate or liquidated damages before mentioned, in

78 case one Secrist, who was then prosecuting a claim against said county for stone furnished said Meyers & Son for said jail, should not finally recover the same against said county, which said case and claim was finally decided and determined against said Secrist and in favor of said county by the supreme court of the State of Indiana, as reported in 100th vol. of Indiana Reports, at page 59.

It further appeared that no part of said sum of two thousand dollars has ever been paid to said Meyers & Son or to any one, but that the same remains wholly unpaid.

It further appeared that said agreement in reference to said two thousand dollars was not spread of record by said board of commis-

sioners defendant, but that the other part of said agreement that day made with said Meyers & Son in reference to the deduction of said sum of forty-five hundred dollars as damages for delay was spread of record in full, but that the auditor afterwards spread said agreement of record without the consent of the board.

There was further evidence tending to show that the actual damages sustained by said county on account of the delay in the
79 completion of said jail by reason of boarding prisoners at other jails did not exceed the sum of twenty-five dollars, and that there was no other evidence offerred tending to show any other actual damage to said county by reason of such delay.

That there was evidence tending to show that the forty-five hundred dollars deducted from the said contract price for said jail on account of said delay was not intended to be enforced against said Meyers & Son; but the defendant offered evidence tending to show that the settlement was made in good faith, and that the two thousand dollars which the defendant promised to pay Meyers & Son in case the Secrist claim was defeated was not intended as a sham.

There was evidence tending to show that the said auditor of said county acted as the agent of the said board of commissioners defendant in auditing claims for all money that was paid out by said defendant on account of said jail, and that said auditor, with the knowledge and consent of the board of commissioners, acted upon the reports of the architect, allowed claims for work and material, and drew his warrants upon the treasurer of said county
80 for payment of the amounts paid upon said building, as well to said Meyers & Son as to laborers engaged thereon, without any allowance of said claims having been otherwise made by said board of commissioners or any order for their payment having been made by it, and that said board of commissioners adopted and ratified the acts of the said auditor in doing such work.

There was evidence tending to show that no payments had been made to Meyers & Son or to plaintiff or to any one specifically on account of the iron and chrome-steel work done in and upon said jail building.

But payments were made upon estimates made by the architect, all of which, except the one made as a basis for the settlement of September 5th, 1883, were itemized; that the estimate of September 5th, 1883, was not itemized; that no estimates were made specifically for the iron and chrome-steel work except for the inconsiderable sums above mentioned.

Defendants' Evidence.

And be it known that at the proper time and in the proper manner the defendant offered to read in evidence the complaint and proceedings in cause number 7819 in the said circuit court of the United States for said district, being a suit brought by the Diebold Safe & Lock Company, on the 30th day of June, 1884, against the said William H. Meyers & Son; which complaint and proceedings are in the words and figures following:

81 UNITED STATES OF AMERICA, *District of Indiana:*

In the Circuit Court of the United States for the District of Indiana.

DIEBOLD SAFE & LOCK CO.
vs.
WILLIAM H. MYERS & EDWARD F. MYERS. } No. 7819.

1st par. The plaintiff, a corporation, resident of Ohio, complains of the defendants, residents of Indiana, and says said defendants are indebted to plaintiff in the sum of eight thousand dollars on ac't of and for iron and steel work furnished by plaintiff to defendants for def'ts' use in the construction of the jail building in Delaware county, Indiana, and in a like sum for materials furnished by said plaintiff to defendants, and for a like sum for materials—iron and steel—and labor furnished for and upon the jail in Delaware county, Indiana, for defendants at their especial instance and request, a bill of the particulars whereof is filed herewith, marked "A," all of which said sums are due and wholly unpaid.

2nd par. And the plaintiff, further complaining of the defendant-, says she is a corporation resident in the State of Ohio and engaged in the construction and manufacture of iron and steel work used in the construction of jails and other public buildings, and the defendants are residents of the State of Indiana, and are and were at the date hereinafter stated contractors engaged in the erection and finishing all kinds of buildings, and particularly public buildings,
82 jails, court-houses, &c.; that on the 6th day of March, A. D. 1882, said defendants Meyers had a contract to erect and were engaged in the erection of a jail building in Delaware county, Indiana, in the construction of which a large quantity of worked and formed iron and steel was required; that on said day and year the plaintiff agreed and contracted, in writing, with the defendants, by the name and style of "W. H. Meyers & Son" (a copy of which said contract is filed herewith, marked "B"), to furnish to them, said defendants, in position in said jail at Muncie, Ind., all of that portion of the work for the same (locks included) and described under the head of iron and chrome-steel work according to the architect's plans delineating them as adopted by the Board of Commissioners of said County of Delaware at and for the sum of seven thousand seven hundred —, $7,700.00, when said work should be accepted as completed by the board of commissioners of said county; that pursuant to such contract and agreement the said plaintiff furnished to said defendant- and placed in position in said jail in every respect according to the plans and specifications of said building as adopted by said board of commissioners all of the iron and chrome-
83 steel work contemplated and required both by their said contract and said plans and specifications, and the same and said building was duly and finally accepted as finished and completed on the 5th day of September, 1883, by said board of commissioners; and the plaintiff avers that she did and performed strictly each and all of the stipulations in her said contract by her to be performed

and is guilty of no default in any of them; and she avers that notwithstanding defendants' promises and agreements they have not, nor has either of them, paid plaintiff said sum of $7,700.00 or any part thereof, but the same is due and wholly unpaid.

Wherefore she prays judgement on the two paragraphs in said complaint for the whole sum of such indebtedness as is therein shown and interest thereon since September 5th, 1883, and for all other proper relief; and the plaintiff avers that said William H. Myers has moved from the State of Indiana and has taken his property and effects beyond the jurisdiction of this court, and the other defendant, plaintiff believes, is intending also to remove his property from the State of Indiana, not leaving any such
84 sufficient sum to satisfy plaintiff's claim, and if not restrained at once will effect such removal before any judgement in this case can be obtained, and that unless said defendant is restrained from disposing of his property during the litigation there is great danger of the plaintiff's judgement being rendered ineffectual.

Wherefore plaintiff says there exists an emergency therefor, and prays that a restraining order arise restraining the defendant, Edward F. Myers, from disposing in any way of his property or any part thereof until final judgment herein.

RITTER & RITTER &
J. W. RYAN,
Att'ys for Pl'ff.

EXHIBIT "A" to Cause No. 7819.

CANTON, OHIO, *June 20th*, 1884.

Mess. W. H. Myers & Son, Fort Wayne, Ind.

Received of Diebold Safe and Lock Co., Dr. (subject to conditions of order), payable in New York exchange.

Terms cash.

All shipments made at consignee's risk, and all claims for errors must be made promptly on receipt of goods.

1883.				
Aug. 31.	Iron and steel work, per contract and specifications, for jail at Muncie, Delaware Co., Ind	7,700		
			7,700	
Oct. 29.	Extras as follows:			
85	8 plates for grating doors, 32x18x$\frac{3}{16}$			
	18 " " back of cell door locks	750@3½c.		26 25
	22 " " hasps, 6x17x½			
	1 female cell door-slide,			
	1 cellar door, with frame,	257@3½c.		9
	Labor @ factory on above			35 62
	" on same @ Muncie			9 90
	24 stone bolts, 6x½, with nuts			1 10

22 bars, 15 x 2 x ¼, punched	1 00
2 padlocks (for food-slide & cellar door) & T-handle	4 00
	7,786 87
Interest	213 07
	$8,000 00

EXHIBIT "B" to Complaint. No. 7819.

FORT WAYNE, IND., *Mar.* 6, 1882.

We, the Diebold Safe & Lock Co. of Canton, Ohio, hereby agree to construct and place in position in the new jail to be erected in the city of Muncie, Delaware Co., Ind., all of that portion of the work for same, lock-included, and described under the head of iron and chrome-steel work in specifications and according to plans delineating them, as already adopted by the board of county commissioners of said Co., the same as though the said contract for such work had been awarded to us direct; the contract price for said work to be seventy-seven hundred ($7,700.00) dollars for above work,
86 completed and accepted by the superintendent at the building and the county com'r-, to be paid by the Co. com'r- in monthly estimates, less amount retained according to law and contract between the said Co. com'r- and W. H. Myers & Son on the completion of said work in full, as per am't named in this contract and charged by them against Mess. W. H. Myers & Son, and in full settlement with them for such iron and chrome-steel work under their contract with the Co. com'rs; and any questions that may arise in the construction of the work or deviations from the plans and specifications that may arise or be deemed advisable to be arranged and settled wholly between ourselves and the Co. com'rs and superintendent of the building; and the Diebold Safe & Lock Co., in consideration of the acceptance of the foregoing proposition by the said W. H. Myers & Son, agree to do said work and insure the same in perfect working order, according to the terms proposed & to the acceptance of the said architect & Co. com'rs, and in such quantities and time as shall not materially interfere with the completion of said building, and to complete the whole work on or before Aug. 1st, 1884.

DIEBOLD SAFE & LOCK CO.,
Per FRED.

We, the said W. H. Myers & Son, named in the foregoing proposition, do hereby accept the same and agree that the said Diebold Safe & Lock Co. shall do & perform the work & labor & furnish the iron & chrome-steel work for said jail in manner and form as proposed and agreed by them in the foregoing proposition & agreement, and that they shall receive payment therefor as proposed.

Fort Wayne, Ind., Mar. 6th, 1882.

W. H. MYERS & SON.

87 And afterwards, on the 18th day of July, 1886, the following order was entered in said court in said cause numbered 7819:

Come now the parties, by their respective attorneys, and, upon motion of the plaintiff and the written consent of the defendants now filed herein, it is ordered that the above-entitled cause be, and the same is hereby, dismissed.

And the plaintiff is hereby granted leave to withdraw from the files any original paper or contract herein not a pleading.

88 And also offerred to show that while said proceeding was pending the said Diebold Safe & Lock Company and the said Meyers & Son had a settlement, and that the said Meyers & Son executed unto the said Diebold Safe & Lock Company a written assignment in the words and figures following:

For value received we hereby sell, assign, transfer, and set over to the Diebold Safe & Lock Company the sum and balance due us from Delaware county, Indiana, on account of labor and materials furnished by us in the construction of the jail building at Muncie, in said county, hereby transferring and vesting in said Diebold Safe & Lock Company all rights, claims, and demands of whatsoever nature belonging to us on account of the building of said jail, and intending to release to said company all our interest therein of every kind and description whatsoever.

In witness whereof we have hereunto set our hands and seals this 25th day of November, 1884.

W. H. MEYERS & SON.
WILLIAM H. MEYERS.
EDWARD F. MEYERS.

89 But the plaintiff objected to the admission of said evidence and every part thereof for the reason that the same was irrelevant and incompetent in the trial of this cause, and the court sustained said objection; to which ruling the defendant, The Board of Commissioners of Delaware County, then and there in proper form and manner excepted.

The ground upon which the said defendant offerred said testimony was, as appeared by the exhibits filed with said complaint and the said assignment, that it tended to show that at that time the plaintiff did not claim to have any demand, such as was then asserted upon the trial of this cause, against the said board of commissioners of Delaware county.

And the foregoing being in substance the material facts claimed by the respective parties to have been established by the evidence, and the cause having been argued by the respective attorneys, the defendant, Board of Commissioners of Delaware County, by its attorneys, at the proper time, asked the court to instruct the jury as follows:

Defendant asks the court to instruct the jury as follows and include the same in its general charge:

No. 1. The statutes of Indiana require that contracts for
90 building county jails and other public buildings named in the law shall be advertised and let by the board of county commissioners as an entirety, and not in parts. It was so done in this case. The building contract for the jail between Myers & Son and the Board of Commissioners of Delaware County is not divisable and assignable by the contractor, so that an assignment of a part or parts and mere notice given by such assignee thereof to said board of the assignments by the contractor obligates and binds the board to recognize such assignments and compel the board to account with and pay to the various assignees such sums as might become due them for work done and materials furnished.

Plaintiffs allege in this case that on March 6th, 1882, a contract was made between the contractors, Myers & Son, and the plaintiff, which was given in evidence, and that the board had notice of this contract between said contractors and the plaintiff, and is thereby bound unto the plaintiffs to pay it for the work done and materials furnished by it on the jail.

It is not alleged that the plaintiff had any contract with the
91 board save only by way of the contract between it and Myers & Son of date March 6, 1882, and the alleged subsequent notice thereof to the board.

The plaintiff seeks to hold the board merely on the ground of such notice and knowledge. Now, as such contracts must be let by the board as entireties (and this one was so let to Meyers & Son), the court instructs the jury that mere notice to and knowledge of the contract by the board of the said contract of March 6th, 1882, made on March 6th, 1882, between Myers & Son and the plaintiffs, does not impose any obligation upon the board to settle and account with the plaintiff for any work done or materials furnished thereunder or for any work done on or for the jail.

HARRIS & CALKINS, *For D'f't.*

Which instructions the court refused to give, holding that it was not the law of this case upon the point asked; to which ruling the defendant at the proper time and in the proper manner excepted. And thereupon the court, of its own motion, instructed the jury as follows:

92 *Instructions to the Jury.*

GENTLEMEN OF THE JURY: I have so often had occasion to say to you that the questions of fact, the truth and credibility of witnesses, and the inferences to be drawn from the evidence are exclusively for the jury that it is hardly necessary to repeat it; but in respect to the law of the case you are, of course, bound by the instructions of the court.

It seems that the county of Delaware made a contract with Meyers & Son for the construction of a jail for that county. The contract is dated January —, 1881. In connection with that contract, as is required by a statute of the State, Meyers & Son executed a bond:

"Such bid shall be accompanied by a good and sufficient bond, payable to the State of Indiana, signed by at least two resident freehold sureties, which bond shall guaranty the faithful performance and the execution of the work so bid for in case the same is awarded to said bidder, and that the contractor so receiving said contract shall promptly pay all debts incurred by him in the prosecution of such work, including labor, materials furnished, and for boarding the laborers thereon." And "Any laborer and material man,
93 or person furnishing board to said contractor, as in the preceding section provided, and having a claim against such contractor therefor shall have the right of action against such contractor and his bondsmen therefor, provided such person shall have first demanded payment of the same from such contractor."

After the execution of the contract between the county and Meyers & Son and of the bond provided for by the statute on March 6th, 1882, Meyers & Son made a contract with the Diebold Safe & Lock Company of Canton, Ohio, for the construction of the iron-work under the contract of Myers & Son with the county.

The Diebold Safe and Lock Company is the plaintiff in this suit, and they allege that in pursuance to the contract that they made with Meyers & Son they constructed or put up the iron-work in this jail at the price of $7,700 or thereabouts, and that the county is liable to them for that amount of money.

It is alleged in the complaint that the county received notice of this contract between the Diebold Safe and Lock Company and Meyers & Son, and it is claimed as a legal proposition that the county, by receiving notice of the contract, were bound thereafter to recognize the rights of the Diebold Safe and Lock Company and to receive their pay from the county.

94 The County, which is the defendant in the case, or the board of commissioners representing the county, for answer, deny the complaint, and also plead affirmatively that before they received notice of this agreement, upon which the Diebold Safe and Lock Company predicates its claim, they had paid to Meyers & Son, upon a settlement had with *him*, all that was due to *him* under the original contract. The plaintiff denies this answer, and thus the issues of the case are formed.

I do not understand that, as a matter of fact, there is any dispute about this contract between Meyers & Son and the Diebold Safe & Lock Company having been made, nor is there any dispute about the work having been done by this safe and lock company as stipulated; and there is no proof that the safe and lock company have been paid, or no allegation, indeed, that they have been paid; and so the right of the safe and lock company to recover depends, first, whether the county had notice of this agreement at all, and, second, under the answer, whether they paid to Meyers & Son, on a settlement had with them, all there was due them before they got this notice.

The first proposition, gentlemen of the jury, probably that
95 your minds will be brought to bear upon in logical order will be, When, if at all, did the county commissioners get notice

of this contract which I hold in my hand, namely, the contract between Meyers & Son and the safe and lock company.? That is a question of fact for you to settle upon the evidence, and it is probably a question not without some difficulties, by reason of the variety of testimony there is on the subject. As sensible men, men of experience and judgement, with knowledge of men and their motives, you must analyze this testimony and determine this question, so far as it is necessary to be determined. As bearing upon your consideration of that question, it is proper that I explain to you the legal effect of this agreement between Meyers & Son and the safe and lock company. In substance, as I understand it, without taking the time to read the agreement before you—calling your attention simply to some clauses of it, which I may read liberally or quote from memory—in substance the agreement between Meyers & Son and the safe & lock company is this, that in respect to the iron-work the safe and lock company shall come into the shoes of Meyers & Son; that that company shall do the iron-work—and I use the phrase "iron-work"
96 as, of course, covering the chrome-steel work and all that is embraced in that idea—that, in respect to the iron-work, they should stand as if the work had been struck off to it as original bidder at the price of $7,700; that it should do this work in accordance with the specifications contained in the original contract between the county and Myers & Son, and that it should receive its pay from the county, as Myers & Son would be entitled to if they went on under their contract and did the work—that is to say, that from time to time, as the work progressed, estimates should be made upon which the safe company would be entitled to eighty per cent., twenty per cent. being retained until the work was finished for the purpose of securing the county. The effect of this agreement, gentlemen, as between Meyers & Son and the safe and lock company, was to put the safe and lock company into the position of being entitled to do that work and to get the pay therefor, in the manner stated, from the county. Myers & Son made no agreement; they are bound by no promise to pay the safe and lock company; they did not bind themselves to pay. The agreement contains no
97 promise on the part of Meyers & Son to pay, and by doing the work under the agreement the safe and lock company acquired no right of action, no demand against Meyers & Son for their pay. They were entitled simply to look to the county; they had no other source to look to for pay. Now, if they understood their contract, and the contract is plain in its terms, that they were to take it as if it had been struck off to them and were to look to the county for their pay, it was of the utmost importance that they notify the county of the time of their agreement in this respect, because, as a matter of law, the county would not be bound by this agreement unless notified of it. The county had made a contract with Meyers & Son, and until they were notified that somebody else had intervened, so as to have some rights under it inconsistent with Meyers & Son's original rights as defined, they would have had the right to pay Meyers & Son every cent as it became due, and, not-

withstanding the making of this agreement, would not have been liable to pay anything on it or by reason of it to the safe and lock company.

The plaintiff, The Safe & Lock Company, say that they did prepare such a notice and filed it with the auditor, and they
98 have adduced evidence which they claim shows that it came to the actual knowledge of the board of commissioners. The commissioners, on the other hand—the county—say that they did not get that notice, and they have adduced their evidence on that subject. Now, I shall not analyze this testimony; that is your business. I only call your attention to it, to the importance of the question in respect to the bearing it has on the rights of these parties, and leave it to you to determine whether the notice was given, and, if so, when. I say to you, if the notice was given that from the time it was given it became the duty of the county thenceforth to recognize the rights of the safe and lock company to receive, so far as the estimates should be based upon the iron-work, the proceeds of that work, or, if estimates for any reason were delayed upon that work, it was their business to see that the money which they had stipulated to pay Meyers & Son should not be paid to them in sums that would cut down the amount which would ultimately become due to the ironmen or the safe and lock company. In other words, from the time the board had knowledge of this contract, if they did get knowledge of it, they were bound to recognize
99 the rights of the safe and lock company and withhold money enough to be able to pay them.

As to what constitutes notice to a board of commissioners I will say this to you, that notice to an individual commissioner when not on the board in session is not notice to the board, unless the proof goes far enough to show to you that it actually reached the board—came to the knowledge of the board as a board in session. A man might tell the members of a board in a body—"in a body," I do not mean that; I mean found together in a group—that he had such a claim; but, if before they got into session they forgot about it, it passed out of their memory and never was in their minds when they were in session as a board, that would not be notice in the sense of the law. But proof of the fact that the board were told—I mean the members of the board were told of the fact as individuals—might be enough to satisfy you that in truth they did know of it as a board; but the ultimate thing to prove is that as a board they had notice. Now, I say this much on the subject of notice, so far as it is claimed that notice came by reason of anything that was
100 said to the board or to members of the board; but I instruct you that the auditor of a county bears such a relation to the board and has such duties under the statute as makes him a representative of the board in respect to notices; and I say to you that if a copy of the contract was presented to the auditor in his office, with the request that he communicate it to the board in order to give it notice of the contract, and he received it, that, in law, was notice of the existence of this contract. By the law it was the auditor's duty—was within his powers as auditor and made his duty—to receive such

papers and communicate them to the board. He is the clerk of the board, and when such a paper is placed in his custody as such auditor it is in the custody of the board, and is a matter of which they are bound to take notice and are considered as having notice; so that, if you find as a matter of fact that this copy of the contract, which has been in dispute between the witnesses and between counsel, was presented to the auditor on the sixth day of December or at any time in December, 1882, or at any time from the time it was so presented to the auditor, it became notice of this contract,
101 and any payments that the board afterwards made to Myers & Son, if they made any, whereby they cut down the amount payable on this contract below the sum that would be due this safe and lock company, would not affect the safe and lock company. Their right to recover the money would not be affected by payments made to Myers & Son after notice of this agreement.

Now, I believe this covers all I want to say. Of course there are a great many facts that have been brought to bear upon this question. I might discuss them, but it would be practically in your province, and any suggestion I might make would only be advisory. I have no right to control and no desire to influence your minds. I simply want to call your attention to the point and the importance of it, and leave it to you. I will say, however, before leaving this point, I believe it is conceded that if this notice was given in December, 1882, or even came to the knowledge of the board as late as May or June, or perhaps August, 1883, that there was yet money enough in the hands of the board to meet this claim; so that, if you find that the notice was served at any such time as that, it seems to be
102 conceded all around that your verdict ought to be for the plaintiff for the full amount.

But there is another phase of the case. There was some kind of a settlement made between the board and Myers & Son on September 5th, 1883. Of course, if the board had already received notice of the claim upon this contract—I do not mean mere notice that there was a contract between Myers and Son and the safe and lock company, because the fact that they might have notice of the contract between Meyers and Son and the safe and lock company would not be enough—they must have such notice of the terms of that contract as to inform them that they were to pay the money to the safe and lock company. They must have known that part of the contract, because that is the significant part of the contract in the aspects of this case. I say, if they knew the contract in this particular before this settlement was made they had no right to make a settlement in any respect to the advantage of Myers & Son whereby any benefits would go to Myers & Son to the injury of this plaintiff. In other words, they could not pay Myers & Son by way of settlement as against the rights of this plaintiff, if they knew those
103 rights, any more than they could pay Myers & Son directly in the progress of the work; but suppose they had no notice at all, either at the time this settlement was made or any previous time—of course, notice once given, as counsel said, is good right along—they cannot forget it—they are bound to remember it—so

that if they had notice once they had it for all time. The proposition is made on the part of the plaintiff that that was not a good-faith settlement, and did not in fact embrace a full payment to Myers; that, notwithstanding the settlement, there still remains something due to Myers. Of course, if the settlement was a sham, not intended as between the parties to be a settlement, then it has no influence against the rights of the plaintiff in this suit; but if the county commissioners did not know of this claim they had a right to make any settlement they saw fit with Myers & Son, and if they did make a full settlement and paid them off, that is the end of this case, unless, of course, these parties have shown some such mistake in the settlement, as Myers & Son might be allowed to show, if they saw fit, to ask to have it opened up; so that, if they had no notice of this contract, I say to you that of course they were
104 untrammeled to make a settlement with Myers & Son, and if they did make a settlement with Myers & Son, closing up their accounts with Myers & Son, and paid them what was due them and kept nothing back, that would be the end of it. But it is suggested that the settlement was not in good faith; that the object of the board was to escape liability to the plaintiff and to other claimants, and that some things were put into the settlement that did not belong to the account of Myers & Son at all, for the mere purpose of making it look large and for the purpose of cutting out these claimants. It seems to be undisputed that there were $2,000 kept in the hands of the commissioners conditionally with reference to a claim of some one of the name of Secrist—that is, by the terms of this settlement, $2,000 was held back, which it was understood should be paid over to Myers & Son if the claim of Secrist was not established; and it seems to be conceded that the claim of Secrist has been disposed of without establishing any liability against the county; and the plaintiff here insists that that $2,000 they have a right to recover now, because it is in the hands of the board
105 of commissioners, and their suit, at least, is notice of their claim, and, if it has not been paid over to Meyers & Son, they have a right to it. The only response to this that I recollect of hearing is that the finishing of the jail cost more than it was contemplated, and that they held that sum back to make that good to the county. It seems to be undisputed that there was a certain amount—a thousand dollars or thereabouts—held back by the terms of the settlement for the purpose of doing the unfinished work; that it was agreed that said Meyers & Son should receive that much less, the commissioners keeping that much back in order to finish the jail. Those were the terms of the settlement, and consequently, unless Myers & Son deceived the commissioners in some way with regard to the amount that was necessary to finish the jail, the commissioners have no right to hold this $2,000 on that account, even though the finishing of the jail cost more than they intended or expected. If the settlement was a good settlement, made as a real settlement between Myers & Son and the commissioners, and a sum was kept back for the purpose of finishing the jail, that is the end of the

county's rights as against Myers & Son on that scope, unless, I say, Myers & Son deceived them.

106 Of that, I believe, there is no pretence or claim in the evidence. It seems to me, therefore, to follow that, so far as the $2,000 is concerned, there is that much of Myers & Son's money in the hands of the commissioners that this plaintiff may seize upon. I do not know of any defence against that proposition in the case. It is claimed, in addition, that there were $4,500, on a mere pretence of a counter-claim against Myers & Son, kept back on account of the delay in finishing the building of the jail, it being stipulated in the original contract that they should be entitled to $25 per day for such delay, but that, as a matter of fact, it was not intended that that should be charged as against Myers & Son, but it was kept out in order to help Myers & Son defraud their creditors. I say to you, as against all these creditors, or as against the plaintiff, at least, the commissioners, under the terms of this contract, had a right to settle their damages with Myers & Son; but, of course, that means a good-faith settlement, and once being settled, if it was in good faith, and they did not know of the agreement of these parties—in other words, did not have notice of the agreement—that settlement is bind-

107 ing on this plaintiff; but if it was a mere pretense of settlement and was being so manipulated as to enable them to turn over money to Myers & Son, then they ought not to be allowed to get the benefit of, and that I will leave to you, as a question of fact, whether it was a good-faith transaction. It is claimed, too, that there was about a thousand dollars paid over to the architect that was charged to Myers & Son, when it was no part of Myers & Son's responsibility, and that it was done for this same fraudulent purpose of enlarging the amount of payment. Charging this fraudulent purpose embodies the charge that the commissioners had notice of this agreement. So, too, if they had notice of the terms of this contract they had no right to pay that $1,000, nor to make any other arrangement with Meyers & Son for the purpose of cutting down this claim; but if they did not know of this agreement and made their arrangements with Myers & Son in good faith it was binding on this plaintiff, and they, the board, would have a right to make arrangements to pay the architect or anybody else; but if, as a matter of fact, it was done as a sham, it has no effect, and so I submit that to you, first, upon the proposition, Did the board

108 at that time know of this claim of the plaintiff? If they did they were bound to take care of it; if they did not know of it, then did they act in good faith? If they did their act is not to be disturbed; but if it was in bad faith, not intended really to be charged to Myers & Son, then you would have a right to disregard it. The same with regard to the paying of the architect. If they made the agreement with Myers & Son in good faith, without knowing of the plaintiff's claim, the plaintiff has no right to complain. If they did that in bad faith, to make a pretense to cut the plaintiff out, you would be allowed to disregard it; and so with regard to the remainder of the $4,000—the $2,851.80. If they paid that without knowledge of this agreement it cannot be reclaimed by the plaintiff;

if they did pay that with knowledge of this agreement of course they cannot get credit for it as against the plaintiff.

Now, in respect to some claims that they paid during the time that Mr. Parry was superintendent. The burden of proof is on the board of commissioners to show what payments they have made on the jail account. They claim that they paid out about
109 $3,600. I believe, under the superintendency of Parry before the date of this settlement, counsel for the plaintiff, on the other hand, claims that they had authority from Myers & Son to the extent of only seven hundred odd dollars, they having produced Myers & Son's orders to that extent. The burden is on the defendant to show that any payments they claim to have made were made to Meyers & Son directly, or when made to others with the authority of Myers & Son, and unless they have shown that you should disregard such payments. Of course, this is in regard to any situation before the settlement was made. If they had paid out money without authority from Myers & Son and a settlement was afterwards made and such payments were brought into that settlement—I mean a good-faith settlement, of course, without any intention to wrong other creditors, with the consent of Myers & Son—they would be payments as if they had been authorized by Myers & Son in the first instance; but if they made payments without authority and afterwards received notice of this contract of the plaintiff before the ratification or before the settlement they could not, even with
110 the consent of Myers & Son, treat those as payments to the injury of this plaintiff.

It seems, also, that there is the sum of the $3,700 paid out after the settlement, and, as you perceive, after the county commissioners took the jail off of the hands of Myers & Son, with the understanding that they would finish it themselves. By the terms of this settlement they had kept out a thousand dollars for that purpose. If that settlement is allowed to stand as a good-faith settlement what they paid out after the settlement is not to be considered here at all; and, of course, if this settlement is set aside they cannot be considered, for the reason that such payments would not affect the rights of the plaintiff, not having been made by the authority of Myers & Son, or, rather, unless the evidence showed that they were made by the authority of Meyers & Son.

The case is one, gentlemen of the jury, that requires your close attention and careful consideration. I do not think I could say anything further to aid you, or, at least, that it is my duty to say anything further in regard to it. I believe I have instructed you with respect to the law of each disputed point in the case, and so I will leave it with you.

111 In respect to interest, however, I will say that if the plaintiff prevails on the theory of having given notice to the board of commissioners intesest should be allowed from the time the work was finished, or, at least, after a reasonable time from that point had elapsed for the commissioners to pay them—interest at the rate of six per cent. per annum. On the other theory—that is, that notice of plaintiff's claim was not given before the bringing of the

suit—interest should not be given until the time when the suit, at least, was begun.

And thereupon the defendant, The Board of Commissioners of of Delaware County, at the proper time and in the proper manner excepted to the parts and propositions of law as given by the judge as follows, namely:

"As bearing upon your consideration of that question it is proper that I explain to you the legal effect of this agreement between Myers & Son and the safe and lock company. In substance, as I understand it, it is this, that in respect to the iron-work the safe & lock company shall come into the shoes of Meyers & Son; that that company should stand as if the work had been struck off
112 to it as original bidder at the price of $7,700; that it should do this work in accordance with the specifications contained in the original contract between the county and Myers & Son, and that it should receive its pay from the county as Meyers & Son would be entitled to if they went on under their contract and did the work—that is to say, that from time to time as the work progressed estimates should be made upon which the safe company would be entitled to eighty per cent., twenty per cent. being retained until the work was finished for the purpose of securing the county. The effect of this agreement, gentlemen, as between Meyers & Son and the safe & lock company was to put the safe & lock company into the position of being entitled to do that work and to get the pay therefor in the manner stated from the county. Meyers & Son made no agreement. They are bound by no promise to pay the safe & lock company. They did not bind themselves to pay. The agreement contains no promise on the part of Meyers & Son to pay, and by doing the work under the agreement the safe & lock company acquired no right of action—no demand against Meyers & Son for their pay. They were entitled simply to look to the county. They had no other source to look to for pay."

113 And the following part and proposition, to wit:

"I say to you if the notice was given that from the time it was given it became the duty of the county thenceforth to recognize the rights of the safe & lock company to receive, so far as the estimates should be based upon the iron-work, the proceeds of that work, or if estimates were for any reason delayed upon that work, it was their business to see that the money which they had stipulated to pay to Meyers & Son should not be paid to them in sums that would cut down the amount which would ultimately become due to the ironmen or the safe & lock company. In other words, from the time the board had knowledge of this contract, if they did get knowledge of it, they were bound to recognize the rights of the safe & lock company and withhold money enough to be able to pay them."

Also the following part and proposition, to wit:

"Now, I say this much on the subject of notice, so far as it is claimed that notice came by reason of anything that was said to the board or to members of the board; but I instruct you that the

auditor of a county bears such a relation to the board and has
114 such duties under the statute as makes him a representative of the board in respect to notices; and I say to you that if a copy of this contract was presented to the auditor in his office, with the request that he communicate it to the board in order to give it notice of the contract, and he received it, that, in law, was notice of the existence of this contract. By the law it was the auditor's duty, was within his power as auditor, and made his duty, to receive such papers and communicate them to the board. He is the clerk of the board, and when such a paper is placed in his custody as auditor it is in the custody of the board and is a matter of which they are bound to take notice and are considered as having notice."

And the following part and proposition, to wit:

"So that, if you find as a matter of fact that this copy of the contract which has been in dispute between the witnesses and between counsel was presented to the auditor on the sixth day of December or at any time in December, 1882, or at any time from the time it was so presented to the auditor, it became notice of this contract, and any payment that the board afterwards made to Meyers & Son, if they made any, whereby they cut down the amount payable
115 on this contract below the sum that would be due this safe & lock company, that would not affect the safe and lock company. Their right to recover money would not be affected by payments made to Meyers & Son after notice of this agreement."

To each of which propositions and parts of the said charge above set forth the defendant, The Board of Commissioners of Delaware County, by its attorneys, at the time and in the proper manner excepted.

And thereupon the jury retired, and after due consultation returned into court their verdict.

And thereupon the defendant, at the same term and at the proper time, to wit, on the 4th day of February, 1886, filed its motion and reasons for a new trial as follows:

Comes now the defendant, The Board of Commissioners of Delaware County, Indiana, and moves the court for a new trial in the above-entitled cause for the following reasons, to wit:

(1st.) Because the court erred in refusing to remand this cause to the State court (from whence it was removed) on motion and request of said defendant and for the reasons then and there given.

116 (2nd.) Because the court erred in not dismissing the said action when on the trial of said action it was admitted that the defendant, Edward F. Meyers, was, at the date of making the contract sued on and at the date of making the assignment of the contract mentioned in the complaint and has ever since been and now is, a citizen of the State of Indiana.

(3rd.) For error of law occuring at and upon the trial of said action, in this, to wit, in refusing to allow or permit the defendant to read in evidence the declaration and account therein sued on in cause No. 7819 and therewith the assignment in writing from Wm. H. Myers & Son, of the contract mentioned in the complaint to the

plaintiff, The Diebold Safe & Lock Company, and to know said assignment was made while said action was pending.

(4th.) The court erred in instructing the jury in substance as follows, to wit: (*a.*) The legal effect of the agreement between Myers & Son and the Diebold Safe & Lock Company was and is the same as if the iron and chrome-steel work for the jail had been struck off to the plaintiff as an original bidder at the price of seven thousand seven hundred dollars ($7,700), and that upon notice given
117 by the safe & lock company to the Board of Commissioners of Delaware County of the terms of their contract with Myers & Son the county would become liable upon such notice to pay the Diebold Safe & Lock Company the full amount agreed upon for doing the iron and chrome-steel work as agreed upon between it and Myers & Son, and that the county became liable without reference to whether the board of county commissioners for the county agreed to become the paymaster of the Diebold Safe & Lock Company or not. The court further erred in charging the jury that Myers & Son did not become liable to pay the Diebold Safe & Lock Company for the work so promised and agreed to be done, and that it must look alone to the county for such pay.

(*b.*) The court further erred in charging the jury that if they found that notice was given to the county of the terms of their contract that from that time it was the duty of the board of county commissioners to retain sufficient money to pay the full sum of seven thousand and seven hundred dollars ($7,700) to the Diebold Safe & Lock Company upon the completion of the iron and chrome-steel work by it, and in charging that the board of county commissioners from the time they got knowledge of the terms
118 of the contract between Myers & Son and the Diebold Safe & Lock Company that they were bound to recognize the Diebold Safe & Lock Company and withhold money enough to pay them.

(*c.*) The court further erred in charging the jury that written notice of the terms of the contract between the Diebold Safe & Lock Company and Meyers & Son served upon or left with the county auditor was notice to the board of county commissioners and would bind them from the date on which it was served or given to the county auditor. The court further erred in charging the jury that by law it was the auditor's duty and within his power and made his duty by law to receive papers such as before described and communicate them to the board, and that the board of county commissioners were bound to take notice and would be considered as having notice of whatever the writing contained by filing it with or leaving it with the county auditor.

(*d.*) The court further erred in charging the jury that if they found that a copy of the notice such as was described had been left with the county auditor on the 6th day of December or at any time in December, or at any time after that, that from the time it
119 was so presented it became notice to the board of commissioners and bound the county from that date.

The court further erred in charging the jury that they might

consider, under the evidence, whether the settlement made between Meyers & Son and the county commissioners of date September 5th, 1883, was mere sham and not a good-faith settlement, and in submitting that question to the jury, because there was no competent evidence given on the trial tending to impeach it, and therefore the question should not have been submitted to the jury.

The court further erred in refusing to give to the jury in charge the instruction tendered and asked by the defendant.

(6th.) The court erred in trying said cause as a common-law action, when, in fact, if any ground of action is shown at all it is an equitable suit.

(7th.) The verdict of the jury is contrary to law.

(8th.) The verdict of the jury is contrary to the evidence.

(9th.) The damages assessed by the jury are excessive.

(10th.) The court has no jurisdiction of this cause.

WM. BROTHERTON,
HARRIS & CALKINS,
Att'ys for D'f't, Board of Commissioners of Delaware Co.

120 Which motion for a new trial was overruled; to which ruling the said defendant, The Board of Commissioners of Delaware County, excepted in proper form and manner, and at the same time the court overruled the motion made at the commencement of the trial, hereinbefore set forth; to the overruling of which motion the said defendant, The Board of Commissioners of said County, likewise excepted in proper form and manner.

And thereupon, on the 13th day of March, 1886, the defendant filed its motion in arrest of judgement as follows:

Comes now the said defendant, The Board of Commissioners of Delaware County, and moves the court to arrest the judgement herein for the following reasons, namely:

1. For that the complaint and declaration herein of said plaintiff is entirely insufficient in law and does not state facts sufficient to constitute a good cause of action against the said defendant.

2. For that it appears, both by the record herein as well as by the evidence given on the trial of said cause, that this court has no jurisdiction to hear and determine the questions at issue between the parties.

121 3rd. For that the record shows that if any cause of action exists in favor of the plaintiff against the defendant the same is an equity and not a common-law action; that therefore the trial of said cause by a jury was a mistrial, and no judgement can be rendered upon the verdict.

Wherefore the defendant, The said Board of Commissioners of Delaware County, prays that the said judgement may be in all things arrested.

HARRIS & CALKINS,
Att'ys for Pl'ff.

Which motion was afterwards, to wit, on the 13th day of March, 1886, overruled by the court; to which ruling the said defendant likewise excepted in proper form and manner.

And thereupon, on this 26th day of March, 1886, and during the term at which said cause was tried, this bill of exceptions was made, presented, and signed by the judge of this court and ordered to be made a part of the record in this cause.

In witness whereof the signature of the said judge of said court is hereto affixed.

WILLIAM A. WOODS.

122 And afterwards, to wit, at the November term of said court, on the 28th day of April, 1886, before the Honorable William A. Woods, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the defendant, by counsel, and files his appeal bond herein in the sum of twelve thousand dollars, with C. E. Jones and William Brotherton as sureties therein, which bond is approved by the court.

123 UNITED STATES OF AMERICA, } ss:
District of Indiana, }

I, Noble C. Butler, clerk of the circuit court of the United States for the district of Indiana, do hereby certify that the above and foregoing is a full, true, and complete transcript of the record in the above-entitled cause as fully as the same appears of record and on file in my office.

Witness my hand and the seal of said court this 28th day of May, A. D. 1886.

[Seal Circuit Court of the United States, District of Indiana.]

NOBLE C. BUTLER, *Clerk.*

124 UNITED STATES OF AMERICA:

The President of the United States of America to the judges of the circuit court of the United States for the seventh judicial circuit and district of Indiana, Greeting:

Because on the record and proceedings, as also on the rendition of a judgment in a plea which is in the said circuit court, before you, between The Diebold Safe and Lock Company and The Board of Commissioners of Delaware County, Indiana, *et al.*, a manifest error hath happened, to the great damage of the said The Board of Commissioners of Delaware Co., as by its complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid on this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the eleventh day of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, this 20th day of May, A. D. 1886.

[Seal Circuit Court of the United States, District of Indiana.]

NOBLE C. BUTLER, *Clerk.*

125 United States of America to The Diebold Safe & Lock Company, William H. Myers, and Edward F. Myers, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Indiana, wherein The Board of Commissioners of Delaware County, Indiana, is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William A. Woods, judge of the district court of the United States for the district of Indiana and *ex officio* judge of said circuit court, this 20th day of May, in the year of our Lord one thousand eight hundred and 86.

[Seal Circuit Court of the United States, District of Indiana.]

WILLIAM A. WOODS.

126 On this — day of ——, in the year of our Lord one thousand eight hundred and —, personally appeared —— —— before me, the subscriber, —— ——, and makes oath that he delivered a true copy of the within citation to —— ——.

—— ——.

Sworn to and subscribed the — day of ——, A. D. 187–.

—— ——.

We acknowledge service of the within notice & citation.
May 24th, 1886.

RITTER & RITTER,
Attorneys for Diebold Safe & Lock Co.

We acknowledge service of the within notice & citation.
May 29th, 1886.

WILLIAM H. MYERS.
EDWARD F. MYERS.

Endorsed on cover: Indiana C. C. U. S. No. 295. The Board of Commissioners of Delaware County, Indiana, plaintiff in error, *vs.* The Diebold Safe & Lock Company, William H. Myers, and Edward F. Myers. Filed June 26, 1886.

APR 1 1889
JAMES H. McKENNEY.
CLERK.

Original

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1888.

No. 296.

DELAWARE COUNTY,

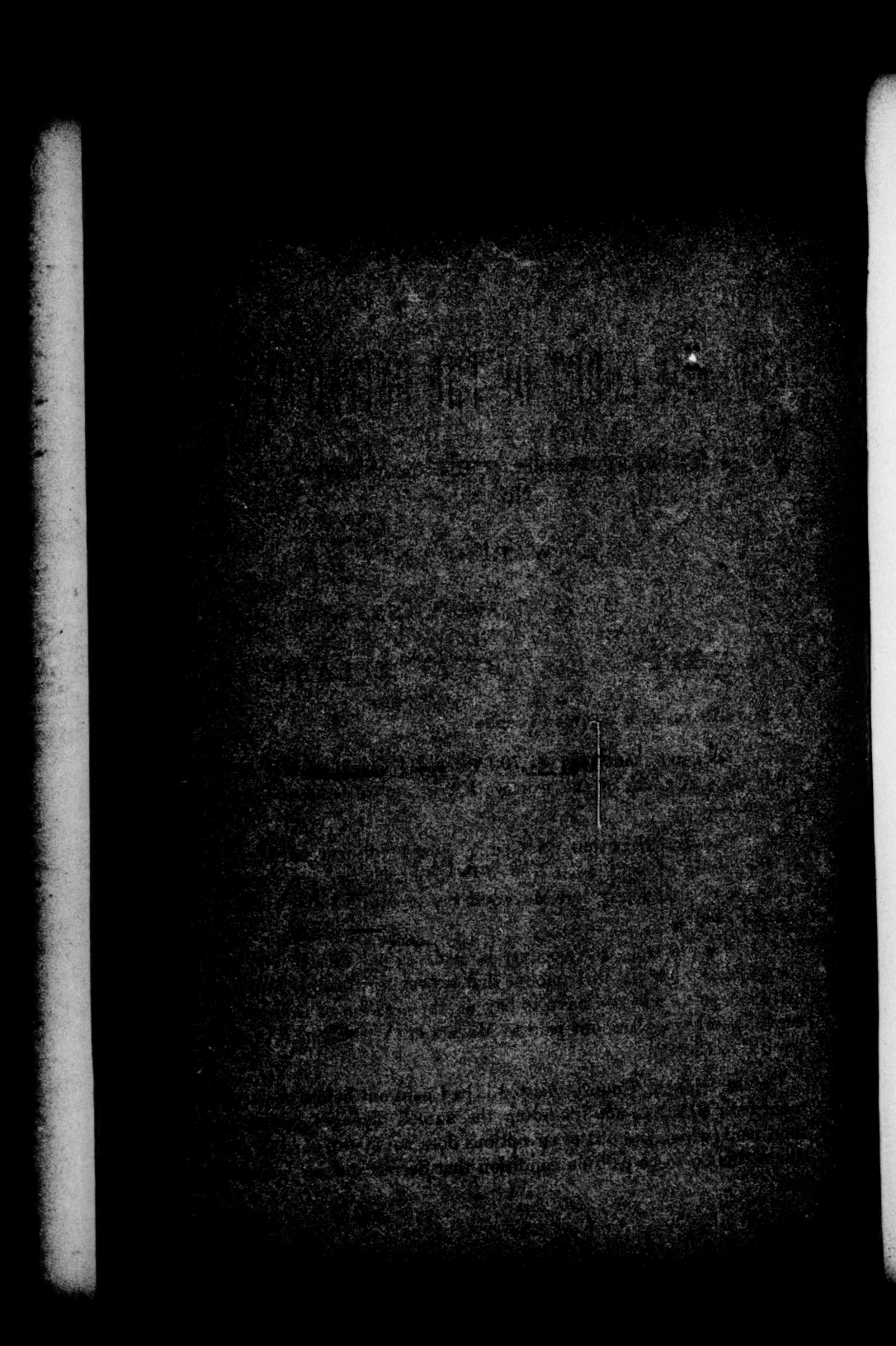
vs.

DIEBOLD COMPANY.

REPLY BRIEF BY APPELLANT.

ADDISON C. HARRIS,
WILLIAM H. CALKINS,
Attorneys for Appellant.

Journal Job Print, Indianapolis.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1888.

No. 296.

DELAWARE COUNTY,

vs.

DIEBOLD COMPANY.

REPLY BRIEF BY APPELLANT.

Plaintiff in error desires to reply:

1. The statement that $7,700 "was the exact amount of the architect's estimate of the iron work," is not to be found in the record.

2. The statement that the County Board "discharged Meyers" in the spring of 1883 is not true. The contract was not forfeited, canceled or abandoned, but Meyers & Son continued the work under the contract.

3. It is not true, if the county is made to pay this $7,700, that then $16,784 "is the full amount that it ever legitimately and honestly has paid or would have to pay for the erection of said jail except the unknown amount paid to Meyers at the settlement of September 5, 1883."

On the trial the County insisted it had paid out before the settlement over $18,000, not including the agreed damages, or the sum then paid (which the bill of exceptions does not state), nor the additional $2,000 to be paid on condition that Secrest did not gain that suit.

The plaintiff, on the trial, claimed the County had not paid out prior to the settlement "more than the sum of $13,000." (Record, p. 27; folio 73.)

As the plaintiff elected not go to trial on the second paragraph of the declaration to recover, as assignee of Meyers & Son, "all sums and balance," (Exhibit "C," Rec., p. 6); the precise state of the accounts was not involved, but the right of recovery rests wholly, on the first paragraph based on the instrument of March 6, 1882. (Exhibit "B," Rec., p. 5.)

So that after the Court had settled the law of the case on demurrers, two questions only were open for trial.

First. Was the building contract assignable in parts, and if so, then, *Second*, did notice merely to the County of the partial assignment (Exhibit "B"), bind it to the payment of $7,700 to the Diebold Company?

4. It seems needless to again repeat that the material and controlling averment of the first paragraph of the declaration on which plaintiff elected to go to trial, is that by the agreement of March 6, 1882, (Exhibit "B") Meyers & Son—

"Assigned, sold and transferred to it, plaintiff, so much of said claim and demand against said Board of Commissioners and said County of Delaware, on account of said contract and the erection and construction of said jail, to the extent of said $7,700; that said Board of Commissioners and said County of Delaware had notice of said contract and of said assignment at the time the same was made, and at and before the time that any payments were made to Meyers & Son," etc. (Rec. p. 3.)

5. Appellee's counsel do not question the proposition that notice to the Auditor was not notice to the Board.

6. They assert (p. 27), "the Board did assent." This is not the theory upon which the Court put the case to the jury, and is untrue. The case turns, as to the instructions or answers to these questions: Whether notice of the instrument of March 6, 1882, binds the county, whether notice to the Auditor was enough, and whether the contract was assignable in parts.

7. We ask to reply briefly to the argument made in support of the position that a public building contract under the Indiana Statute, is divisible into fragments, and each part assignable, so as

to make the County account with and responsible to each and every assignee.

This is not a case where *A* (Meyers & Son), having a demand against *B* (the County), gives *C* (Diebold & Co.) an order payable out of moneys in *B's* hands coming to *A*. Meyers & Son did not owe Diebold & Co. anything on March 6, 1882, and by the terms of that instrument, the County never was to be their debtor for the money to be paid to the Diebold Co. The County was to be made debtor to the Diebold Co. when it did certain work, by notice, and not by acceptance of the proposition, or consent to become paymaster. And the Court told the jury that mere notice to the County of this arrangement made between Meyers & Son and the Diebold Co., imposed upon the County the *status* of debtor to the Diebold Co. in the sum of $7,700.

On this proposition of law, we join issue. It is clear such a transaction is an assignment of a part of the executory contract, and not the assignment of an existing debt, even in equity. And our contention is, the contract is not assignable, especially in fragments, so as to make the County debtor to the Diebold Co., without the consent of the Board for a part of the contract price, leaving it debtor to Meyers & Son for the remainder; yet the Court told the jury it was debtor for $7,700, if it had notice, regardless of whether it consented or not.

The learned counsel have not cited a case or text to prove that a public executory contract may be assigned in parts so as to impose the *status* of debtor upon the municipality to each holder of a part, without its consent. Of course, if the municipality has power to and does consent, it does not lie in its mouth to refuse to account with and pay to the partial assignee the money due for the part performed; so, after the contractor has performed the contract and has money due him, he may draw an order against the money, which the municipality may pay and charge to him. This is paying him. But that is not this case. The following cases cited rest on the principle that the municipality consented to the assignment.

Devlin v. *Mayor*, 63 N. Y. S., see p. 14;
Brockett v. *Blake*, (City of Boston) 7 Met. 335;
(See argument City Attorney, p. 338);
St. Louis v. *Clements*, 42 Mo. 69, p. 73.

So, in the following cases cited, a creditor or contractor having money due or coming due from a person or body, gave orders on the debtor that he pay to a third person and charge to him. If the debtor accepts the order, assumpsit lies; if not, then a bill in equity to reach the fund.

Dannot v. *Comptroller*, 77 N. Y. 45, 48;
Crocker v. *Whitney*. 10 Mass. 319;
Field v. *Mayor*, 6 N. Y. 179;
Parker v. *Syracuse*, 31 N. Y. 376.

But this is not such a case. The County did not accept or promise to pay plaintiff. So assumpsit will not lie.

The instrument of March 6, 1882, was not a bill, draft, or order drawn against a fund, due or to come due to Meyers & Son for work done or to be done by them. Counsel say (p. 9) it is in the nature of an order or draft "which being assented to (accepted) by the County * * amounts to an acceptance," etc. They thus are driven to rest on the law of acceptance, which is foreign to this case.

Counsel cite cases of street improvement contracts held to be assignable as a whole, in support of their position.

Street improvement contracts where the cost is taxed to the abutting property are of a different character to a State or Government contract. The property owner, or rather the *res*, is the real debtor and the municipality acts in the capacity of an agent in laying the tax for the use of the contractor. The city is not the real paymaster, the money is not paid out of the public treasury. The city keeps no accounts and has no vouchers. Certificates are issued by the city to the contractor against the owners or the lots which are liens on the abutting property. The property-holder is free to make a different contract as to prices and times of payment with the contractor.

Gee v. *Small*, 12 Wis. 450.

As the public municipality is not paymaster, its *status* is not changed by any assignment, and therefore the question of public policy of the assignment of Government contracts is not involved. The following cases fall within this class (none of which hold that a street improvement contract may be assigned in parts):

Morse v. *Gilman*, 18 Wis. 273 (Milwaukee);
Taylor v. *Palmer*, 31 Cal. 240 (San Francisco);
Ernst v. *Kunkle*, 5 O. St. 521 (Cincinnati);
St. Louis v. *Clemens*, 42 Mo. 69;
Smith v. *Flack*, 95 Ind. 116 (Indianapolis);
Pendleton v. *St. Louis*, 49 Mo. 565.

Our position as to the non-assignability of government contracts in whole—where the government is the paymaster—is not assailed, much less the division of an entire contract among a number of assignees. Neither is our contention met that under the Statute the contract was not assignable—or the position that the 7th clause of the contract (Rec., p. 8, folio 17) prohibits it.

8. The decision of Deady, J. (14 Fed. Rep, 177), is cited, to the point that a County Commissioners' Court is not a "State Court." He held so under the Statute of Nebraska, because, he said, they could not enforce the attendance of witnesses, nor render judgments. As pointed out before, the Commissioner's Court of Delaware county had power to "try causes" (R. S. Sec. 5742) and make "decisions" (*Id.* 5769) and "adjudge costs" (Sec. 5822), on which fee bills issue. It is well known that under Sec. 5742 witnesses are subpoenaed and the like, as in the Circuit Court. It is true, on appeal, the cause is tried as an "original cause," but the Appellate Court may "send the case down" with an order how to proceed, or make a final determination, (Secs. 5777–8.) Such is the Federal rule on appeals from the District to the Circuit Court, R. S. U. S. Sec. 636. The appeal does not *ipso facto* vacate the judgment, for every one must admit if the appellant dismiss his appeal the judgment stands in full force.

We accept as true the test applied by the late Chief Justice when on circuit in Virginia, (1 Hughes 275). Was the Commissioners' Court, when trying this case, acting as the executive or judicial department of the State government? And we answer in the very words of the Supreme Court of Indiana, pronounced on January 23, 1889, in *Maxwell* v. *Board, etc.* (N. E. R., Vol.—, p. —)

"It is settled in this State that the Board of Commissioners is a court of limited jurisdiction, and that in passing upon claims presented to it, it acts in a judicial capacity. Its adjudications in matters over which it has jurisdiction, are as binding upon the parties as the adjudication of any other court."

It matters not whether the State Court is "of limited or general jurisdiction."

Gaines v. *Fuentes*, 92 U. S., 19;
Guy v. *Baltimore*, 100 U. S., 434.

Whether the Commissioners' Court is a court depends on the law of the State. The removal is to be taken from the State Court wherein the suit is "commenced." On appeal the case is tried on the same pleadings. The oral evidence is not taken and certified. It is true new evidence may be given, as it may in this Court. (R. S. U. S., Sec. 698.) The petition must be filed "in said State Court," that is, in the Court where the suit is "commenced." This case was commenced in the Commissioners' Court, and there was an adjudication, and an appeal into the Circuit Court; but the case was not commenced in that Court, without which it had no jurisdiction to receive the petition for removal.

Counsel quote from *Bass, etc., Co.* v. *Parke County*, (115 Ind. 235) to uphold their contention that a county must pay for the material used, if the contractor does not. And in the absence of the facts the words quoted (p. 8) are misleading.

Meyers, in that case, was awarded the contract to build a court house and a jail. He sub-let the iron-work to the Bass Company. Before the buildings were completed Meyers abandoned the job, and the Commissioners forfeited the contract, and undertook to carry the buildings to completion. At the time of Meyers' failure he owed the Bass Co. $10,000. The Bass Co. finished the iron-work and filed a claim charging that the County agreed—if it would go on—to pay, 1st, the debt Meyers owed it of $10,000; 2d, the value of the work, etc., put in the buildings after the Board forfeited the contract. The lower Court held that the Board could not employ the Bass Co. without advertising, etc. The Supreme Court held the Commissioners had no power to assume the $10,000 which Meyers owed, but had power, without a new letting in this case, to complete the buildings, and was bound to pay the Bass Co. for the work, etc., done *after* the failure, and which they engaged it to do. Now, the quotation is good law. Delaware County could not employ the Diebold Company while the contract with Meyers & Son was in force. And if it could not assume the *status* of debtor voluntarily, it is not easy to see how it could be imposed by mere notice.

9. On the question of jurisdiction counsel "concede" Meyers & Son were essential parties to the second paragraph of the declaration, (p. 8-9.) If so, upon their theory the action was not "commenced" in the Delaware Circuit Court, when it was removed. A declaration and the presence of all essential parties are necessary to the commencement of a suit. The entire case is the removable suit. Counsel insist that the dismissal of the second paragraph cured the error. We do not concede that plaintiff "could not make any other defendants parties to the claim filed before the Board of Commissioners excepting the County itself." (p. 8.) The power is given to "try causes," (Sec. 5742), which implies all necessary powers to prepare a case for trial. So that if it be held that the trial in the County Court was not a "trial" within the meaning of the removal act, but a means only of getting jurisdiction over the County; then it follows that the removal was premature, as in the Delaware Circuit Court essential parties were not even made defendants. So that one of two things must be true—either the suit was tried in the Commissioners' Court, or it was not fully commenced in the Circuit Court. And a case not entirely begun, is not commenced at all.

Appellant abides the judgment of the Court.

ADDISON C. HARRIS,
WILLIAM H. CALKINS,
Atty's for Appellant.

INDIANAPOLIS, Feb. 7, 1889.

FILED
OCT 22 1888
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 296.

THE BOARD OF COMMISSIONERS
OF DELAWARE COUNTY, INDIANA,

vs.

THE DIEBOLD SAFE AND LOCK COMPANY,
WILLIAM H. MEYERS AND
EDWARD F. MEYERS.

ADDISON C. HARRIS,
WILLIAM H. CALKINS,
Attorneys for Plaintiff in Error.

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STATEMENT.

For the sake of brevity, the plaintiff in error will be called the County, and the defendant in error the Diebold Company.

By the laws of Indiana, hereafter set out, the County had authority to erect a jail by public contract only.

1. On January 20th, 1882, the County made a contract with Meyers & Son, of Ft. Wayne, Indiana, to erect a county jail according to an adopted plan, for $20,000, to be completed by September 4th of that year. (Exhibit "A," Transcript pp. 6–7; folio 13, *et seq.*)

2. The law of Indiana requires that all contracts for county buildings costing over five hundred dollars, shall be let to the lowest responsible bidder, after public advertisement, who shall give bond to perform the work according to the plans and specifications adopt-

ed and filed in the office of the Auditor of the county. (Acts 1875, p. 36; R. S. 1881, Sections 4243, 4244 and 4245.)

In 1877 an additional statute was enacted, as follows:

"*Contractor's Bond.* No bid for the building or repairing any court house, jail, poor-asylum, bridge, fence, or other county building or work shall be received or entertained by the Board of Commissioners of any county in this State, unless such bid shall be accompanied by a good and sufficient bond, payable to the State of Indiana, signed by at least two resident freehold sureties; which bond shall guaranty the faithful performance and execution of the work so bid for, in case the same is awarded to said bidder, and that the contractor so receiving said contract, shall promptly pay all debts incurred by him in the prosecution of such work, including labor, materials furnished, and for boarding the laborers thereon." (R. S. 1881, Section 4246.)

"Any laborer and materialman, or person furnishing board to said contractor, as in the preceding section provided, and having a claim against such contractor therefor, shall have the right of action against such contractor and his bondsmen therefor: *Provided*, Such person shall have first demanded payment of the same from such contractor." Ibid, Section 4247.

A proper bond was given in this case.

The contract contained the following provisions:

7. "The County will not in any manner be responsible to or accountable for any loss or damages that may happen in or to said works, or any part or parts thereof, respectively; or for any of the materials or other things used and employed in finishing and completing the said work."

8. "Should the contractors fail to finish the work on or before the time agreed upon, they shall pay to the parties of the first part (the County) the sum of $25 *per diem* for each and every day thereafter the said work shall remain unfinished, as and for liquidated damages." (Transcript, p. 8, folio 17.)

3. On March 6th, 1882, the contractors, Meyers & Son, sublet the iron and steel work to the Diebold Safe and Lock Company, as follows:

FORT WAYNE, IND., March 6th, 1882.

"We, the Diebold Safe and Lock Co., at Canton, O., hereby agree to construct, and place in position, in the new jail to be erected in the city of Muncie, Delaware county, Indiana, all of that portion of the work for same (locks included), and described under the head of iron and

chrome-steel work in specifications and according to plans delineating them, as already adopted by the Board of County Commissioners of said county, the same as though the contract for such work had been awarded us direct; the contract price for said work to be seventy-seven hundred dollars ($7,700.00) for above work completed and accepted by the superintendent of the building and the County Commissioners, to be paid by the said County Commissioners in monthly estimates, less amount retained according to law and contract between the County Commissioners and Wm. H. Meyers & Son, on completion of said work in full, as per amount named in this contract and charged by them against Messrs. W. H. Meyers & Son, and in full settlement with them for such iron and chrome-steel work under their contract with the County Commissioners; and any questions that may arise on the construction of the work, or deviations from the plans and specifications that may arise or be deemed advisable, to be arranged and settled wholly between ourselves and the County Commissioners and the superintendent of the building; and we, the Diebold Safe and Lock Company, in consideration of the acceptance of the foregoing proposition by the said W. H. Meyers & Son, agree to do said work, and insure the same in perfect working order, according to the terms proposed, and to the acceptance of the said architect and County Commissioners, and in such quantities and time as shall not materially interfere with the completion of said building, and to complete the whole work on or before August 1, 1882.

(Signed) "DIEBOLD SAFE AND LOCK CO.,
Per Fred."

"We, the said W. H. Meyers & Son, named in the foregoing proposition, do hereby accept the same, and agree that the said Diebold Safe and Lock Co. shall do and perform the work and labor, and furnish the iron and chrome-steel work for said jail in manner and form as proposed and agreed by them in the foregoing proposition and agreement, and that they shall receive payment therefor as proposed.

(Signed) "W. H. MEYERS & SON."

Dated Fort Wayne, Ind., March 6, 1882.

4. The County was not a party to this arrangement. On the trial the fact was actively in dispute whether the County Board or Auditor ever had notice, or knowledge of, or consented to the foregoing arrangement. (Transcript, pp. 25, 26, 27; folios 68, 70–71, 74.)

5. The jail was not completed until September, 1883.

6. On September 5, 1883, the jail being completed, the Board made a settlement in full with Meyers & Son, the contractors. The liquidated damages of $25 a day, counting working days only

amounted to $7,825. At that time one Secrest was waging a suit against the county to enforce a claim against the property, for the value of stone furnished to and used by Meyers & Son in erecting the jail. In the settlement the Board did not exact the full amount of the damages agreed upon, but retained only $4,500, which, together with the sums theretofore paid to Meyers & Son, and the sum paid on settlement, exceeded the contract price of the jail. It was further agreed, that in case the county was not held liable in the Secrest case, the Board would pay Meyers & Son the further sum of $2,000.

The Supreme Court of the State afterwards held that the County was not liable, as no lien could be taken on a public building or fund.

Secrest v. *Board, etc.*, 100 Ind., p. 59;
(Transcript, pp. 29—33, folio 81—89.)

7. Meyers and Son failed to pay the Diebold Company anything.

8. On June 30, 1884, the Diebold Company began suit in the United States Circuit Court for the District of Indiana against Meyers & Son to recover the money due it. (Transcript, pp. 29–33, folios 81–89.)

9. While this suit was pending, to-wit, on November 25th, 1884, Meyers & Son executed to the Diebold Company the following instrument.

"For value received, we hereby sell, assign, transfer and set over to the Diebold Safe and Lock Company, all sum and balance due us from Delaware county, Indiana, on account of labor and materials furnished by us in the construction of the jail building at Muncie, in said county, hereby transferring and vesting in said Diebold Safe and Lock Company all rights, claims and demands of whatsoever nature belonging to us on account of the building said jail, and intending to release to said Company all our interest therein of every kind and description whatsoever.

"In witness whereof we have hereunto set our hands and seals, this 25th day of November, 1884.

(Signed,) W. H. MEYERS & SON.
WILLIAM H. MEYERS.
EDWARD T. MEYERS."
(Transcript, p. 6; folio 13.)

10. Thereupon the Diebold Company filed its claim against the County with the County Auditor in the nature of a declaration [called a complaint under the Indiana practice] in two paragraphs. The first was grounded upon the building contract of January 20, 1882, and the sub-contract of March 6, 1882; the second upon the assignment of November 25, 1884 [being the same declaration found in this record.]

Afterwards, on March 4, 1885, the case came on to be tried in the Commissioners' Court of Delaware county, and the record recites:

"Comes now the Diebold Safe and Lock Company, by John W. Ryan and Ritter, their attorneys, and submit their claim, heretofore filed with the Auditor, for iron and steel furnished Wm. H. Meyers & Son, contractors for the construction of the new jail built in Delaware county, State of Indiana. Said claim is for $7,700.00, and is in these words and figures (here insert). Thereupon comes Wm. Brotherton on behalf of the Board, and the matters of said claim are now for hearing and trial submitted to the Board, and the Board, after hearing all the evidence, and inspecting said cause of action and all things touching the same, and being fully advised in the premises, now disallow said claim so made and filed, in all things, and order that said claim be not paid, in whole or in part; to which ruling the said parties at the time object and except."

The statute in force at that time is as follows (R. S. 1881):

SEC. 5758. "*Filing Claims.* Whenever any person or corporation shall have any legal claim against any county, he shall file it with the County Auditor, to be by him presented to the Board of County Commissioners."

SEC. 5742. "Such Commissioners shall adopt regulations for the transaction of business; and in the trial of causes, they shall comply, so far as practicable, with the rules for conducting business in the Circuit Court."

SEC. 5769. "*Appeals from, lie to Circuit Court.* Any person or corporation, feeling aggrieved by any decision of the Board of County Commissioners, made as hereinbefore provided, may appeal to the Circuit Court of such county, as now provided by law."

SEC. 5760. "*Suits for Claims.* No Court shall have original jurisdiction of any claim against any county in this State, in any manner except as provided for in this act."

SEC. 5761. "*Mode of Presenting Claims.—Proof.* No allowance shall be made by such Commissioners, unless the claimant shall file with such

Commissioners a detailed statement of the items and dates of charge, nor until such competent proof thereof is adduced in favor of such claim as is required in other Courts; but if the truth of such charge be known to such Commissioners, it may be allowed without other proof, upon that fact being entered of record in the proceedings about the claim.''

While acting judicially, the Board is a court of record having a seal, the County Auditor acting as the clerk, and the County Sheriff its executive officer.

12. After the trial and judgment, the Diebold Company prayed an appeal to the Circuit Court of Delaware county, which was granted on filing a bond. (Transcript, p. 9, folio 19.)

13. The appeal was perfected by filing a complete transcript in the Delaware Circuit Court on the 18th day of March, 1885, in vacation. (Transcript, p. 2, folio 2.)

14. On the third day of the April term, 1885, of the Delaware Circuit Court, the Diebold Company filed its petition for removal into the United States Circuit Court on account of prejudice and local influence (Transcript, p. 10, folio 21), and a transcript was taken before any action was had by the State Court and filed in the Federal Court on the 21st day of April, of that year. (Transcript, p. 1, folio 1.)

15. Here the County moved to remand the cause, which was denied. (Transcript, p. 14, folios 36–40.) Thereupon the Diebold Company made Meyers & Son defendants, who, on the 13th of June waived process, entered an appearance, and filed an answer as follows:

''The defendants William H. Meyers and Edward F. Meyers, for answer to the complaint herein, say, that it is true that they assigned the contract with and debt due from the defendant to the plaintiff, as set out in the complaint; that the matters set out therein are true, and that they have no interest in this suit; wherefore they pray judgment for costs.

(Signed,) WILLIAM H. MEYERS.
EDWARD F. MEYERS.''
(Transcript, p. 13, folio 34.)

Afterwards, on January 19, 1886, before the trial, the Diebold Company dismissed the second paragraph of its declaration grounded on the assignment heretofore set out, of date November 25, 1884.

(Transcript, p. 19, folio 50.) And at the same time dismissed the suit No. 7,819 against Meyers & Son, until then pending in the United States Circuit Court.

16. On the trial it was indisputably established that E. F. Meyers had at all times been a citizen of Indiana, and W. H. Meyers, a citizen of Michigan. (Transcript, p. 22, folio 16.)

PLEADINGS.

Thus the first paragraph of the complaint filed in the Commissioners' Court, on appeal and removal, became the delaration on which the cause was tried in the United States Circuit Court. This paragraph sues upon a building contract between the County and Meyers & Son, of date January 20, 1882, and the sub-contract between the Diebold Company and Meyers & Son, dated March 6, 1882, and alleges, in substance, that the Diebold Company notified the County of the last-named contract, and of its provisions, before the time the Diebold Company began its work, whereby, it is alleged, the County became indebted to the appellee in the sum of seventy-seven hundred dollars ($7,700.00).

The United States Circuit Court held this paragraph good on demurrer. (Transcript, p. 14; folio 36.)

Thereupon the County filed an answer in six paragraphs.

Paragraph 1. The general issue.

Paragraph 2. Payment.

Paragraph 3. Settlement with, and payment to, Meyers & Son, in September, 1884, without notice of the pretended assignment by Meyers & Son to the plaintiff.

Paragraph 4. The same as the third, setting forth the facts particularly.

Paragraph 5. After referring to the statutes above set forth, on page 2, the paragraph states that Meyers & Son executed a good and sufficient bond, with James Motherwell and Wm. J. Pratt, sureties, as by the statute provided, which bond, by statute, stood for the

use of the Diebold Co.; that the County, before the commencement of this suit, settled with Myers & Son, and paid them in full, including the value of the work performed by the plaintiff; that the County never, in any way, recognized or assented to the pretended assignment of March 6, 1882, or agreed to become paymaster to the Diebold Company; but in all the settlements and payments, Meyers & Son were treated as the only contractors with which the defendants had anything to do; all of which was known to the Diebold Company at all times. That the Diebold Company, relying upon the responsibility of Meyers & Son, on the 30th of June, 1884, commenced its action in *assumpsit* in the United States Circuit Court for the District of Indiana, against Meyers & Son, on its contract made at Fort Wayne on March 6, 1882; which suit was on the identical items of account set out and sued for in its complaint in this suit, being cause No. 7819, then pending in said United States Circuit Court.

Paragraph 6. Questioning the jurisdiction of the Court on the ground that the plaintiff was a citizen of Ohio, and that Wm. H. Meyers was, at the time of the commencement of this action, and of its removal, a citizen of the State of Michigan, and Edward F. Meyers a citizen of Indiana.

Thereupon the plaintiff successfully demurred to the 4th, 5th and 6th paragraphs of the answer, and replied the general issue to the 2d and 3d paragraphs.

The County excepted to the rulings on demurrer, and went to trial on the issues joined by the first paragraph of the declaration, and its pleas of payment to, and settlement with, Meyers & Son, resulting in a verdict and judgment against the County in the sum of $8,739.50. (Transcript, pp. 20–21.)

EVIDENCE REFUSED.

1. At the proper time the defendant offered to read in evidence the declaration in said cause No. 7819, being the case of the *Diebold Safe and Lock Company* v. *Wm. H. Meyers & Son*, together with the account against Meyers & Son, and contract of March 6, 1882, sued on therein, together with the dismissal of said cause, and

therewith offered to prove that while said suit was pending, the plaintiff received from Meyers & Son the assignment dated Nov. 25, 1884, assigning all demands of every kind held by said firm against said county to the Diebold Company. "The ground upon which the defendant offered said testimony was, that it tended to show that at that time the plaintiff did not claim to have any demand, such as now asserted, upon the trial of this cause, against Delaware County." (Transcript, page 29, folio 80, *et seq.*)

The plaintiff successfully objected "because the same was irrelevant and incompetent;" and the evidence was excluded. (Transcript, pages 29–33, folio 80–90.)

This ruling was excepted to and assigned as the third reason for a new trial—Transcript, page 43, folio 116—and is properly reserved of record.

INSTRUCTION REFUSED.

At the proper time the defendant requested the Court to instruct the jury as follows:

"The Statutes of Indiana require that contracts for building county jails, and other public buildings named in the law, shall be advertised and let by the Board of County Commissioners, as an entirety and not in parts. It was so done in this case. The building contract for the jail between Meyers & Son and the Board of Commissioners of Delaware county, is not divisible and assignable by the contractor, so that an assignment of a part or parts and mere notice given by such assignee thereof to said Board of the assignments by the contractor, obligates and binds the Board to recognize such assignments, and compels the Board to account with and pay to the various assignees such sums as might become due them for work done and materials furnished.

"Plaintiffs allege in this case that, on March 6, 1882, a contract was made between the contractors, Meyers & Son, and the plaintiff,—which was given in evidence—and that the Board had notice of this contract between said contractors and the plaintiff, and is thereby bound unto the plaintiff to pay it for the work done and materials furnished by it on the jail.

"It is not alleged that the plaintiff had any contract with the Board save only by way of the contract between it and Meyers & Son of date March 6, 1882, and the alleged subsequent notice thereof to the Board.

"The plaintiff seeks to hold the Board merely on the ground of such notice and knowledge. Now, as such contracts must be let by the Board as entireties—and this one was so let to Meyers & Son—the Court instructs the jury that mere notice to and knowledge of the contract by the Board of the said contract of March 6, 1882, between Meyers & Son and the plaintiff, does not impose any obligation upon the Board to settle and account with the plaintiff for any work done or materials furnished thereunder, or for any work done on or for the jail."

Which instruction was refused, because "it was not the law of this case upon the point asked." (Transcript, p. 34, folio 90–91.)

INSTRUCTIONS GIVEN—EXCEPTIONS.

The Court instructed the jury at length. The whole are in the record. The defendant excepted at the proper time and in the proper manner to four propositions laid down by the Court as the law of the case.

The first exception relates to the legal effect of the contract between the Diebold Company and Meyers & Son of March 6, 1882.

FIRST EXCEPTION.

The Court said:

"It is proper that I explain to you the legal effect of this agreement between Meyers & Son and the Safe and Lock Company. In substance, as I understand it, it is this: That in respect to the iron work, the Safe and Lock Company shall come into the shoes of Meyers & Son; that that Company should stand as if the work had been struck off to it as original bidder at the price of $7,700; that it should do this work in accordance with the specifications contained in the original contract between the county and Meyers & Son, and that it should receive its pay from the county as Meyers & Son would be entitled to if they went on under their contract and did the work—that is to say, that from time to time as the work progressed, estimates should be made upon which the Safe Company would be entitled to receive 80%; 20% being retained until the work was finished for the purpose of securing the County. The effect of this agreement as between Meyers & Son and the Safe and Lock Company was to put the Safe and Lock Company into the position of being entitled to do that work and get the pay therefor in the manner stated from the County. Meyers & Son made no agreement; they are bound by no promise to pay the Safe and Lock Company. They did not bind themselves to pay. The agreement contains no promise on the part of Meyers & Son to pay,

but by doing the work under the agreement the Safe and Lock Company acquired no right of action—no demand against Meyers and Son for their pay. They were entitled simply to look to the County. They had no other source to look to for pay.''

The parties at the trial contested bitterly the fact whether the Board had had notice, before it made final settlement with the contractors, of the contract of March 6, 1882, between the Diebold Company and Meyers & Son. It was claimed by the appellee that the Board, while in session at one time before the work began, was orally notified by Edward F. Meyers and John D. Fred, an agent of the Diebold Company, of the existence of said contract and its provisions. Each member of the Board denied the truth of these statements. (Transcript, page 25, folio 68.)

The plaintiff claimed also that on December 6, 1882, at a regular session, but at a time when the Board was taking a temporary recess, Mr. Fred filed in the office of the County Auditor a copy of the contract of March 6, 1882, with a notice to the Board to the effect that it would be held to pay the sum of $7,700.00 out of the contract price to be paid to Meyers & Son. The Auditor denied the truthfulness of this statement. (Transcript, page 25, folio 69.)

The plaintiff introduced oral testimony tending to prove that in the month of April or May, 1883, while the Board was in session, they were informed by said Fred and others, orally, of the existence and provisions of said contract of March 6, 1882, and that the Board then announced that it would pay no more money to Meyers & Son until the laborers and materialmen, including the plaintiff, were paid.

The members of the Board and the Deputy Auditor who was said to have been present on this occasion, denied the truthfulness of these statements. (Transcript, p. 25; folio 70)

SECOND EXCEPTION.

Bearing upon the question of notice, the Court instructed the jury as follows:

"I say to you, if the notice was given, that from the time it was given it became the duty of the County thenceforth to recognize the rights of the Safe and Lock Company to receive, so far as the estimates should be based

upon the iron work, the proceeds of that work; or, if estimates, for any reason, were delayed upon that work, it was their business to see that the money which they had stipulated to pay Meyers & Son, should not be paid to them in sums that would cut down the amount which would ultimately become due to the ironmen or the Safe and Lock Company. *In other words, from the time the Board had knowledge of this contract, if they did get knowledge of it, they were bound to recognize the rights of the Safe and Lock Company, and withhold money enough to be able to pay them.*"

THIRD EXCEPTION.

"I instruct you that an Auditor of a county bears such relation to the Board, and has such duties under the statute, as makes him a representative of the Board in respect to notices; and I say to you, that if a copy of the contract was presented to the Auditor in his office, with the request that he communicate it to the Board in order to give it notice of the contract, and he received it, that, in law, was notice of the existence of this contract. By the law it was the auditor's duty—was within his powers as Auditor, and made his duty—to receive such papers and communicate them to the Board. He is the clerk of the Board, and when such paper is placed in his custody as such Auditor, it is in the custody of the Board, and it is a matter of which they are bound to take notice and are considered as having notice."

FOURTH EXCEPTION.

"So, that if you find as a matter of fact that this copy of the contract which has been in dispute between the witnesses and between counsel, was presented to the Auditor on the 6th day of December, or at any time in December, 1882, or at any time from the time it was so presented to the Auditor, it became notice of this contract, and any payments that the Board afterwards made to Meyers & Son, if they made any whereby they cut down the amount payable on this contract below the sum that would be due this Safe and Lock company, that would not effect the Safe and Lock company. Their right to recover the money would not be affected by payments made to Meyers & Son after notice of this agreement." (See Transcript, page 42; folio, 112-6.)

See, also, fourth reason for new trial. (Transcript, page 44, folio 117.)

Under the instructions, the jury returned a verdict for the plaintiff for $7,700 and interest, and a motion for a new trial, for reasons hereafter stated, being overruled, the defendant moved to arrest judgment on three grounds.

1. Insufficiency of the declaration.

2. Want of jurisdiction.

3. If there was a cause of action, the same was triable in equity and not at common law. (Transcript, page 45, folio 120.)

This motion being overruled, judgment was rendered, proper bills of exceptions were filed, and the case is now before this Court upon a writ of error.

SUPREME COURT OF THE UNITED STATES.

THE BOARD OF COMMISSIONERS
OF DELAWARE COUNTY, INDIANA,
PLAINTIFF IN ERROR,

vs.

THE DIEBOLD SAFE AND LOCK COMPANY,
WILLIAM H. MEYERS AND EDWARD F. MEYERS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

ASSIGNMENT OF ERRORS.

Comes now said plaintiff in error, by its attorneys, and says that in the record and proceedings in this cause there is manifest error in this, to-wit:

1. The Court erred in receiving the transcript on removal into said Circuit Court of the United States, and in refusing to remand the cause to the Delaware Circuit Court for the State of Indiana.

2. The Court erred in sustaining the demurrer severally to the fourth, fifth and sixth paragraphs of the answer.

3. The Court erred in refusing to allow plaintiff to give in evidence the record and proceedings in said cause No. 7819.

4. The Court erred in refusing to give to the jury in charge Instruction No. 1, asked by the appellant.

5. The Court erred in instructing the jury in substance that if notice was given to the Board of Commissioners of the terms of the contract between Meyers & Son and the Diebold Safe and Lock Company, of date March 6, 1882, that it was bound thereafter to withhold from its contractor money sufficient to be able to pay said Diebold Company its claim for work then done, or thereafter done, upon the county jail.

6. The Court erred in instructing the jury in substance, that if a copy of the contract of March 6, 1882, between Meyers & Son and the Diebold Company, was presented to and received by the County Auditor in his office, with the request to communicate it to the County Board, then in law the County was chargeable with notice thereof, although the same was not communicated to the Board or any member, and neither County Commissioner had any actual notice or knowledge thereof at the time of the final settlement with and payment in full to Meyers & Son.

7. The Court erred in overruling appellant's motion for a new trial.

8. The Court erred in refusing to arrest judgment for the reasons set forth in the motion made by appellant.

9. The Court had no jurisdiction to try the cause and render judgment against the appellee.

Wherefore the appellant prays that the judgment herein may be reversed, annulled, and altogether held for naught.

ADDISON C. HARRIS,
WILLIAM H. CALKINS,
Attorneys for Plaintiff in Error.

ARGUMENT.

We will discuss the questions in the following order:

1. As to jurisdiction.
2. As to the evidence excluded.
3. As to the instructions.
4. Arrest of judgment.

HAD THE COURT JURISDICTION?

The rule is—

"Unless the contrary appears affirmatively from the record, the presumption upon writ of error or appeal is that the Court below was without jurisdiction."

King Bridge Co. v. *Otoe County*, 120 U. S. 226;
Robinson v. *Anderson*, 121 U. S. 522;
Cameron v. *Hodges*, 127 U. S. 322;
Hegler v. *Faulkner*, 127 U. S. 483.

First. The building contract shows that the contractors were citizens of Indiana. (Transcript, p. 6.) The first paragraph charged that by the contract of March 6, 1882, the contractors "assigned to the Diebold Co. so much of their said contract * * as related to said iron and chrome-steel work." (Transcript, 3; folio 4.) The second alleged that the jail was completed and the County owed a balance of $10,000, which the contractors had "sold, assigned and transferred to the plaintiff" by the instrument of date November 25, 1884. (Transcript, p 5; folio 10.)

The petition for removal was silent as to the citizenship of the assignors. The suit is grounded on the building contract; the assignment of a part of it in the first paragraph, and the whole in the second. The contract was a "chose in action," within the Federal Statutes, and the Court was prohibited from entertaining jurisdiction.

Sheldon v. *Sill*, 8 How. 449;
Bradley v. *Rhines' Adm's*, 8 Wall. 393.

Second. A suit is not removable until it is "commenced." It is not commenced until the State court has jurisdiction over the cause. The State court has no jurisdiction to hear the case until the proper parties are before it. It is not charged in the first paragraph that the County had *agreed* to pay the Diebold Company for the work; or that it had paid the contractors down to the sum of $7,700, or any less sum; or that it had settled with the contractors. Passing the question for the time whether the contract under the law, and Indiana Statute, was assignable, in whole or in part, it is elementary that if a demand is divided into fragments, the holders of the various fragments must unite as plaintiffs; or at most, those who may refuse to join as plaintiffs, must be joined as defendants. A single demand, arising out of a single contract, can not be split into fractions and a separate action maintained on each fraction. This is the rule at common law, in equity, and under the codes. So that on the first paragraph the contractors were necessary parties-plaintiff. Without their presence the Court could not proceed. That branch of the suit was not "commenced."

Again, the Indiana Code enacts:

"When any action is brought by the assignee of a claim arising out of contract, and not assigned by *endorsement in writing*, the assignor shall be made a defendant to answer as to the assignment, or his interest in the action." (R. S. 1881, Section 276.)

The word "endorsement" is held to its technical meaning. The assignor of any contract, note or demand, not endorsed on the instrument itself, is an essential party by statute, and the cause can not proceed in his absence—unless the debtor waives his presence.

Strong v. *Downing*, 34 Ind. 300;
Share v. *Lowry*, 48 Ind. 205;
Clough v. *Thomas*, 53 Ind. 24.

The plaintiff below so understood, as it made the assignors parties-defendant after the motion to remand had been entered. The motion was filed on June 1, (Transcript, p 14, folio 36,) and denied on that day (folio 39), and thereupon plaintiffs were given leave to make Meyers & Son defendants (folio 39.) They entered their appearance and filed answer on June 13 (folio 33), and the motion to remand being renewed, was again overruled (folio 39.)

One of the assignees, or both, being citizens of Indiana, and necessary parties-plaintiff in the first paragraph, the suit was not removable. Not being parties either plaintiff or defendant to the cause, it had not been properly "commenced" in the State court, and hence the Federal court did not acquire jurisdiction.

Jefferson v. *Driver*, 117 U. S. 272;
Cambria Iron Co. v. *Ashburn*, 118 U. S. 54;
Hancock v. *Holbrook*, 119 U. S. 586;
Cameron v. *Hodges*, 127 U. S. 326;
Blacklock v. *Small*, 127 U. S. 103;
Bliss on Code Pleading, Sections 65 and 118.
Groves v. *Ruby*, 24 Ind. 418;
Lapping v. *Duffy*, 47 Ind. 57;
Revised Statutes (Ind.), 1881, Section 312.

On the trial, and after Meyers & Son became defendants, it was indisputably established that E. F. Meyers was a citizen of Indiana, and W. H. Meyers was at all times a citizen of Michigan. In *Hancock* v *Holbrook, supra*, it is said:

"A suit can not be removed from a State court to a Circuit Court of the United States, under sub-Section 3 of Section 639 of the Revised Statutes, on the ground of 'prejudice or local influence' unless * * all the defendants are citizens of the State in which the suit was brought."

Third. The statute declares: Any suit commenced in any State court may be removed, etc.

The action before the Commissioner's Court was a suit. It was to recover money from the County. The statute does not allow an execution to be levied on the public funds, but prescribes that when a sum is found to be due—

"The County Auditor may 'draw his warrant upon the Treasurer for a sum allowed, or certified to be due by any court of record authorized to use a seal, and having jurisdiction beyond that of Justices of the Peace—*or by the Board of County Commissioners.*'" (R. S. 1881, Section. 1414.)

The rule of the Government is the same. (R. S. Sec. 1089.)

The action in the Commissioner's Court was to recover a judgment of allowance for the sum of $7,700.

The record recites that the plaintiff "submitted" the cause to that Court "for hearing and trial," and that "after hearing all the evidence" the decision was against the Diebold Co.; wherefore, it appealed. (Transcript, p. 8, folio 18.) Any proceeding in a court, by which a person pursues that remedy which the law affords for the enforcement of his civil demands against another, is a suit.

Weston v. *Charleston*, 2 Pet. 449-464;
Gains v. *Fuentes*, 92 U. S. 19;
Searl v. *School District*, 124 U. S. 197;
Kohl v. *U. S.*, 91 U. S. 367, 375;
Boom Company v. *Patterson*, 98 U. S. 403;
Hess v. *Reynolds*, 113 U. S. 73.

Is the Commissioners' Court of Delaware County a "State Court?"

The answer must be found in the statutes of Indiana. There are various statutes scattered through the Acts for the last thirty-five years which, in the compilation of 1881, are illy arranged. We shall not copy at length only the more material statutes.

1. There are four terms a year. Section 5736.

2. It is a court of record and seal. Sections 5743, 5746, 5895.

3. The Auditor is the Clerk. Sections 5895, 5743, 5740.

4. The Sheriff is the executive officer. Section 5740.

5. The Court may issue "process" to the Sheriff. Section 5868.

6. The Court may administer oaths, preserve order, punish contempts by fine and imprisonment, and enforce all orders by attachment or other compulsory process, and issue executions for fines. Section 5744.

7. "Such Commissioners shall adopt regulations for the transaction of business; and *in the trial of causes* they shall comply, as far as practicable, with the rules for conducting business in the Circuit Court." Section 5742.

8. "In all cases *tried* or heard before Boards of County Commissioners in which costs are *adjudged* against any party," fee bills, may issue, etc. Section 5822.

9. Any one having a demand against the County, must file a detailed statement of his claims with the Auditor, as the means of process. Sections 5758, 5761.

10. No allowance shall be made "until such competent proof thereof is adduced in favor of such claim, as is required in other courts," unless they state in the record they personally know the charge is just. Section 5761.

11. At the close of "each term of their court" publication is made of all allowances, etc. Section 5765.

12. "From all decisions for allowances" appeals may be taken to the Circuit Court of the county. Sections 5769-5771.

13. Appeal bonds are necessary, and complete transcripts of the proceedings, and all papers and documents filed go up. Sections 5773-5774.

14. "Such appellate Court may make a final determination of the proceeding thus appealed, and cause the same to be executed, or may send the same down to such Board, with an order how to proceed, and may require such Board to comply with the final determination made by such Court in the premises." Section 5778.

The Commissioners' Court is clothed with judicial power to try contested election cases (Section 4761); liquor license cases (*Halloran* v. *McCullugh*, 68 Ind. 179); cases for taxes wrongfully collected (R. S. Section 5813; *State* v. *Board*, 63 Ind.; *Shultz* v. *Board*, 20 Ind. 178); and all claims against the County and many other matters.

Without further multiplying words, suffice it to say:

It has always been the law in this State that when the Commissioners' Court were required to decide upon the validity of a demand against the county, they acted judicially, and under the law in force in 1884 the judgment stood until set aside on appeal.

State v. *Board, etc.*, 101 Ind. 69;
Board v. *Gregory*, 42 Ind. 32, 39;
Board v. *Ritter*, 90 Ind. 368;
Board v. *Montgomery*, 106 Ind. 519;
Board v. *Wood*, 35 Ind. 72;
Weston v. *Lumley*, 33 Ind. 490.

Fourth The motion in arrest of judgment again brought the questions of jurisdiction in review. It arose also upon the demurrer to the sixth paragraph of the answer.

Unless each of our contentions is denied, this case will end here.

EVIDENCE EXCLUDED.

The trial Court held throughout the cause, that if in fact the Board had notice of the contract, made at Fort Wayne on March 6, 1882, it was bound to take notice thereof and comply therewith at its peril. It clearly appears upon the record, both by bill of exceptions and instructions of the Court, that the case was made to turn before the jury upon their finding as to that fact.

John D. Fred, the agent of the Diebold Company, testified that on several occasions during the erection of the jail, he notified the Board of the arrangement his company had about pay. Others testified in behalf of the corporation to the same effect. The members of the Board and the county officers denied this with equal sincerity.

Now, any words or acts on the part of the Diebold Company implying or admitting that it did not assert any claim against the County, would be competent evidence to rebut its position before the jury.

So the defendant offered to put in evidence the declaration in Cause No. 7819, being the suit begun June 30, 1884, by the Diebold Company against Meyers & Son; the assignment made on November 25, 1884, and the subsequent dismissal and all proceedings in that cause.

The declaration offered in evidence is in two paragraphs. The first paragraph is upon an open account showing that the Diebold Company charged the work to Meyers & Son.

The second paragraph states that Meyers & Son having a contract to erect a jail, did, on the 6th day of March, 1882, employ the Diebold Company "to furnish to them, said defendants, in position in the jail at Muncie, Indiana, all that portion of the work for the same (locks included), described under the head of "Iron and chrome-steel work," according to the architect's plans as adopted by the Board of Commissioners of said county of Delaware at and for the sum of $7,700.00—when said work should be accepted as completed by the Board of Commissioners of said county. That pursuant to such contract and agreement, the said plaintiff furnished to said defendant, and placed in position in said jail, in every respect according to the plans and specifications of said building, as adopted by said Board of Commissioners, all of the iron and chrome-steel work contemplated and required, both by their said contract and said plans and specifications, and the same and said building was duly and finally accepted as finished and completed on the 5th day of September, 1883, by said Board of Commissioners; and the plaintiff avers that she did and performed strictly each and all of the stipulations in her said contract by her to be performed, and is guilty of no default in any of them; and she avers that notwithstanding defendants' (Meyers & Son) promises and agreements, they have not, nor has either of them, paid plaintiff said sum of $7,700.00, or any part thereof, but the same is due and wholly unpaid.

Then follows an allegation to the effect that Meyers & Son were removing their property from the State to defraud the plaintiff, and a prayer for a temporary injunction.

On the 25th of November, 1884, while the suit was pending, the Diebold Company took from Meyers & Son an assignment for "the sum and balance due us from Delaware County, Indiana, on account of labor and materials furnished by us in the construction of the jail at Muncie, hereby transferring and vesting in said Diebold Safe and Lock Company all rights, claims, demands of whatsoever nature belonging to us on account of the building of said jail, and intending to release to said Company all our interest therein of every kind and description whatsoever."

Of course this included and was intended to include the two

thousand dollars additional to be paid Meyers & Son when the Supreme Court of the State should decide that the County was not liable for the Secrest claim.

Now, these proceedings in Cause No. 7819 tended to prove three things:

1. That the Diebold Company did not then hold the County as debtor, else it would not abandon a solvent and reliable paymaster, to pursue Meyers & Son, when fleeing from the State to escape payment.

2. That at that time, the Diebold Company was familiar with the settlement made on the 5th day of September, 1883; and by taking the assignment on November 25th, and securing the proceeds of that settlement, thereby ratifying it, the Diebold Company asserted in the strongest terms that it had no demand on the County. It was a solemn and deliberate declaration by words and conduct. Why was it made? It is a fair inference upon the trial theory of notice binding the County, that it was made because the Diebold Company had not notified the Board of the terms of its contract, and had not, thereby, imposed the obligation of payment directly upon Delaware county.

3. The account shows that in August, 1883, and in June, 1884, the Diebold Company charged Meyers & Son with this debt of $7,700, which was long after the time when Fred and others insisted the Diebold Company had notified the County that it was their debtor, and as claimed by the trial Court the only debtor to the Diebold Company. The conduct of the Diebold Company in this cause, No. 7819, was in direct conflict with the contention it was making at the trial, and went to rebut the assertion by Fred and others of notice to the Board.

Moreover, it showed that during the years 1883–84, Meyers & Son, the Diebold Company, and the Board, had all acted upon the common understanding that the Diebold Company had no claim against the County.

We do not insist that mere statements in unsworn pleadings are in themselves admissions, but taken in connection with subsequent conduct of the party, and not of the attorney, they may be.

"The entry of a charge to a particular person in an account book, or the making out a bill in his name, is an admission that the goods were furnished on his credit."

Storr v. *Scott*, 6 C. & P. 241;
Thompson v. *Davenport*, 9 B. & C. 78;
Wood's Pr. Ev., p. 582.

INSTRUCTIONS.

The Circuit Court tried the case on the theory that if the Board had notice of the contract between Meyers & Son and the Diebold Company, the County was bound to retain $7,700 from Meyers & Son and pay it to the Diebold Company.

The Court, after laying before the jury the building contract, and the partial assignment of March 6, stated the issues thus:

"The Diebold Safe and Lock Company is the plaintiff in this suit, and they allege that in pursuance of the contract that they made with Meyers & Son for constructing or putting up the iron-work in this jail at the price of seventy-seven hundred dollars or thereabouts, that the County is liable to them for that amount of money.

"It is alleged in the complaint that the County received notice of this contract between the Diebold Safe and Lock Company and Meyers & Son; and it is claimed as a legal proposition that the County, by receiving notice of the contract, were bound thereafter to recognize the rights of the Diebold Safe and Lock Company and to receive their pay from the County.

"The County, which is the defendant in the case, or the Board of Commissioners representing the County, deny the complaint, and, also, plead affirmatively that before they received notice of this agreement upon which the Diebold Safe and Lock Company predicates its claim (of March 6, 1882), they had paid to Meyers & Son, upon settlement with them, all that was due them under the original con-

tract. The plaintiff denies this answer, and thus the issues of the case are formed." Transcript, p. 35.

By reference to instruction No. 1—asked on behalf of the County, it will appear that the Court refused to instruct the jury that the contract was not assignable in parts, and that mere notice to the Board of the contract of March 6, 1882, did not impose any obligation upon the County to account with the plaintiff, and pay it for the work it might do.

But the Court said: "I say to you if the notice was given, that from the time it was given it became the duty of the County thenceforth to recognize the rights of the Safe and Lock Company to receive, so far as estimates should be based upon the iron work, the proceeds of that work; or if estimates for any reason were delayed upon that work, it was their business to see that the money which they had stipulated to pay Meyers & Son should not be paid to them in sums that would cut down the amount which would ultimately become due to the ironmen or to the Safe and Lock Company. *In other words, from the time the Board had knowledge of this contract (of March 6, 1882), if they did get knowledge of it, they were bound to recognize the rights of the Safe and Lock Company, and withhold money enough to be able to pay them.*"

1. Was the contract assignable at all against the County?

2. If so, was it assignable in parts?

The contract between Meyers & Son and the County was one and entire. The statute required it to be so. The Board had no power to let the work in parcels. The whole scope and purpose of the statute clearly discloses that it was the intention of the legislature that a public contract should be let as an entirety to a responsible contractor, with whom only the County should be required to deal.

In Indiana, as elsewhere, public buildings and improvements are not subject to mechanics' liens. They are exempt by the rule of public policy, although not excepted by statute.

Fatout v. *Indianapolis*, 102 Ind. 223;
Secrest v. *Board*, 100 Ind. 59;

Lowe v. *Board*, 94 Ind. 553;
Board v. *O'Conner*, 86 Ind. 531;
Board v. *Warrington*, 82 Ind. 190;
Klein v. *New Orleans*, 99 U. S. 149.

Nor can a lien or claim be enforced against the County funds by way of laborers' or material men's notices for the same reason.

In *Secrest* v. *Board*, 100 Ind. 59, the Court declare "it would be contrary to public policy that a county should be involved in controversies and litigations between contractors and material men and laborers." Their bond is their protection.

As the County could not let the work in parts, nor be compelled to account with material men and laborers under liens and notices, it follows as a corollary that it can not be made to account and settle with many persons by any other mode.

Public policy seems to prevent the assignment of contracts against a government. In 1835 this Court said: "There is no law of Congress which authorizes the assignment of claims on the United States. *United States* v. *Robeson*, 9 Pet. 325.

Since then Congress has passed several statutes in support of this policy.

"SECTION 3737. No contract or order, or interest therein, shall be transferred by the party to whom such contract or order is given, to any other party, and any such transfer shall cause the annullment of the contract or order transferred, so far as the United States are concerned."

So with the mail service:

"SECTION 3963. No contractor for transporting the mail within or between the United States and any foreign country, shall assign or transfer his contract, and all such assignments or transfers shall be null and void."

Salaries, pensions, soldiers' claims and bounties, are other instances. The reason for such policy is, if claims or contracts against Government were assignable in fragments or in whole, public accounts would become entangled and confused, the security of bonds imperiled and lost, and chances given for peculation and fraud.

United States v. *Robeson*, 9 Pet. 319;
United States v. *Gillis*, 95 U. S. 412;
Stafford v. *Kirk*, 97 U. S. 486;
Goodman v. *Niblack*, 102 U. S. 559.

The same reasoning holds with greater force in the case at bar. The County Commissioners are chosen from the body of the people. They are not builders, mechanics, nor accountants. The board is in session only four times a year, unless specially called, and can not act in vacation. The membership changes at every State election, in whole or in part; so that the members of the Board can not, and are not competent, to give supervision daily to the erection of the building, or to keep accounts with every material man, laborer, or other person to whom the contractor may see fit to assign or transfer a fragment of the contract. The manifest purpose of the statute is to prevent the County from becoming entangled and involved in litigation. Plans and specifications must be adopted, and a good bond must be provided. This secures to every man his pay. Now, to allow the contractor to assign, in whole or in parts, the contract to various persons, and draw orders upon the Board for various sums from day to day, would inevitably involve the County in disputes, litigation and loss. Buildings are years in construction. Millions are expended on county court houses and other structures. Every public consideration requires that there should be but one contract and one creditor.

Moreover, the languageof the statute, impliedly, at least, prohibits assignments. Section 4246 requires the successful bidder to give bond that he "shall promptly pay all debts incurred by him in the prosecution of such work, including labor, materials furnished, and for board of laborers thereon."

The next section declares: "Any laborer and material man or person furnishing board to such contractor," may recover upon the bond. The sureties are only required to stipulate that the principal will execute the work and pay his material men and laborers. They are not required to covenant that he or his various assigns will do so.

Now, if the Diebold Company may contract with Meyers & Son for permission to do a part of the work at a given price, if they

can get the money out of the County, but in no event to hold the contractors or their bondsmen liable, it is easy to see that the price will be measured by the risk of the adventure. If the contractor may make such a contract with one person, then he may make similar contracts with every material man and every laborer. And if one may, so may they all notify the Board of their contracts, and the County is thus made to pay such prices as these third persons may fix, else the work must stop. In case the aggregate of these sums exceeds the contract price, or balance unpaid, must there be an accounting of the actual value of the material and labor of each, and a *pro rata* division amongst all?

Must the County pay in the order in which it is notified of the various assignments, or when the parties stipulate, or when the materials are delivered or used?

The rule that such contracts are unassignable, is so wholesome, and the contrary opens the door so wide to confusion, corruption, litigation, fraud, change of venue, removals, appeals, costs, fees, and other burthens, that public policy requires a county should not be required to notice, or settle with any one beyond the person chosen to erect the building.

It will be noticed that the Board is not required to accept the cheapest bid, but the lowest "responsible bidder." (Section 4245.) They may take into account the capability, and integrity, of the bidders. If they award the contract to a capable, honest man whose character is an assurance that he will honestly perform the work, may he assign the contract to another, whom the Board has rejected because of his unfitness and lack of integrity?

This Court has made the words of Lord Denman its own: "You have the right to the benefit you anticipate from the character, credit, and substance of the party with whom you contract."

Ark. Smelting Co. v. *Belden Co.*, 127 U. S. 387.

THE PRECISE QUESTION.

But if it should be thought that this contract is assignable as a unit, it does not follow at all that the contractor, before its perfor-

mance, can divide it into as many parts as he likes, and by notice merely to the Board, impress upon the County the obligation, and duly to account with and pay every person to whom he may assign a part. This is the precise point.

The County asked the Court to instruct that the building contract was not divisable and assignable * * in par s, so as by notice merely to impose the obligation upon the County to recognize the assignee as its debtor, and to account and settle with it for any work done on, or materials furnished for, and placed in the jail by it. This was denied, and the jury were told, in effect, that the contractor had the right to assign parts of the contract, and upon "notice given," the County was bound to recognize the assignee as a creditor, and pay it, so far as the monthly estimates should be based on the iron work, the proceeds of that work; and in this way, or otherwise, withhold from the contractors, and pay to the Diebold Company the price at which it had agreed with Meyers & Son to do the iron work. There is nothing in the contract or record showing that the cost of the iron work bore any ratio to the entire contract price, or that estimates were to be made on this work separately from the other work, or that anybody ever demanded separate estimates thereon.

The case of the *Appeals of the City of Philadelphia*, 86 Pa. St. 179, is exactly on all fours with this case.

The city let a contract to Burton, to furnish the materials and construct a bridge over a railroad within the city. Payments were to be made on monthly estimates as the work progressed. On the day after the contract was let, Burton assigned to Quin "all his (Burton's) interest in the contract, except the item of superstructure." Quin worked on the bridge, and the Court held that the city had notice of the assignment. After notice the city paid Burton in full, and Quin filed his bill in equity in the Common Pleas Court against the city and its officers to recover the sum due him, and had judgment. On appeal the case was reversed. After stating that the city had notice of the assignment, but never admitted any liability to Quin, or assumed to pay him, thus bringing the case to turn on the precise point under immediate consideration, the Court said:

"The question now presented is whether such a corporation is bound to recognize an assignment of a part only of its obligation. If it must, one uncertain part, we see no just reason why it must not, as many parts as the convenience or whim of the obligee shall induce him to assign. The probable and natural effect of holding the municipality liable to each assignee would subject its officers to vexatious annoyances, and the city to litgation and costs. It is conceded that at law the enforcement of such assignments would be questionable."

Jermyn v. *Moffete*, 25 P. F. Smith, 399;
Mandeville v. *Welch*, 5 Wheat, 277.

"Yet it is claimed that they are good in equity, and therefore this assignment may be enforced here.

"There is no doubt that as between individuals, this rule prevails in equity. Whether it shall so be held against a municipal corporation, is now the question. It does not appear to have been decided by this court, nor has the research of counsel been able to cite the decision of any Court of last resort in which it was so held.

"The policy of the law is against permitting individuals, by their private contracts, to embarrass the financial officers of a municipality. A municipal corporation should not be subjected to the embarrassments, responsibilities and costs of adjudicating contracts to which it was not a party."

Erie v. *Knapp*, 5 Casey, 173;
Buckley v. *Eckert*, 3 Barr, 268;

To same effect, see

Secrest v. *Board*, 100 Ind. 62;
Wallace v. *Lawyer*, 54 Ind. 501;
Chicago v. *Hasley*, 25 Ill. 595;
Mervin v. *Chicago*, 45 Ill. 133;
McLellan v. *Young*, 54 Ga. 399;
Shankley v. *Washington*, 5 Pet. 394;
Kendall v. *United States*, 7 Wall. 113;
Geist's Appeal, 104 Pa. St. 351.

This rule of public policy being the law of Indiana, will not be disregarded here. Rather it is controling upon the federal judiciary. If this case had been permitted to remain in the State courts, it is apparent that under the decision in Secrest's case, and other cases noticed, the plaintiff must have failed. And it is not believed any other rule will be enforced by this Court.

Of course, if the statute authorizes the assignment of a public contract in parts, the Government, State or municipality must recognize it.

So, also, it is held in some cases that if the statute is silent and the Government, State or municipality accepts the assignment, be it the whole or a part, and *agrees* to pay the assignee, then the public corporation is bound, and may be compelled to pay by suit. But the case at bar does not fall within either exception to the general rule. Moreover, we have sought to show that assignment and notice merely is not enough, because:

1. It is against the public policy of Indiana.

2. The building statute does not authorize or contemplate an assignment; and therefore prohibits it, as silence in such case is prohibition.

3. The case was not put to the jury on the theory that the Board had recognized the assignment, and *agreed* to pay the assignee.

4. And that in any case a single executory contract can not be parted into various fragments, without the consent of the debtor, and a promise to pay to the holder the part severed from the promise.

Tiernan v. *Jackson*, 5 Pet. 580;
Mandeville v. *Welch*, 5 Wheat, 277;
Bank v. *Hall*, 101 U. S. 43;
Papeneau v. *Naumkeag Co.*, 126 Mass, 372;
Popp v. *Reynolds*, 20 Mich. 88;
Turner v. *McCarty*, 22 Mich. 265;
Gibson v. *Cooke*, 20 Pick. 15;
Bank v. *Noonan*, 88 Mo. 372;
Potter v. *Gronbeck*, 117 Ill. 404.

NOTICE TO AUDITOR.

As stated above, under the theory of the Circuit Court, the question whether the Board had received notice of the assign- of March 6, 1882, became the controlling question of fact, hotly contested before the jury. The plaintiff asserted that notice had

been given on three occasions—twice orally to the Board, and once in writing, through the Auditor, as follows:

On December 6, 1882, during a regular session (term), but at a time when the Board was taking a temporary recess, Mr. Fred, the agent of the Diebold Company, "filed with the Auditor a copy of said contract" of March 6, 1882, "with a written notice therewith to said Board, that the Diebold Company expected to do said portion of the work therein described, and expected to receive its pay therefor direct" from the County, in the same manner as Meyers & Son would have been entitled to do. (Transcript p. 25, folio 69.)

Each member of the Board swore that such notice, if filed, never came to the knowledge of the Board.

Upon this state of facts the Court charged the jury:

"That if a copy of this contract was presented to the Auditor in his office, with the request that he communicate it to the Board, in order to give it notice of the contract, and he received it, that, in law, was notice of the existence of this contract" to the Board, although it was not brought to their personal knowledge.

See third exception, p. 12 *supra*, and motion for new trial. (Transcript 44, folio 119.)

Is this the law?

As this is a question turning largely upon the statutes and decisions of our own State, it becomes necessary to lay them fully before this Court.

The Statutes:

1. "There shall be elected in each county by the voters thereof, * * an Auditor" for the term of four years. (Const. State, R. S. 1881, Sec 152, and Stat. Sec. 5893.)

2. SEC. 5895. "The Auditor, by virtue of his office, shall be clerk of the Board of County Commissioners of the county, and shall keep an accurate record of all the corporate proceedings of the Board. He shall preserve the documents, books, records, maps and papers deposited in his office, and at the expiration of his term deliver the same to his successor."

3. He is a salaried officer, paid out of county funds, and also has taxable fees. (Secs. 5907, *et seq.*)

4. "Auditors may appoint deputies, to perform the duties of Auditor, and shall be liable for the official acts of such deputies." (Sec. 5899.)

5. "Such Commissioners shall sit with open doors." (Sec. 5747.) "The Auditor of the county shall attend the meetings of such Commissioners and keep a record of their proceedings." (Sec. 5740.)

6. On March 29, 1879, an Act in four sections was passed, entitled "An Act regulating the presentation of claims against counties in the State of Indiana, before the Board of County Commissioners, and the adjudication of the same." (Acts 1879, p. 106.) The first section is compiled as Sec. 5758.

"SEC. 5758. Whenever any person or corporation shall have any legal *claim* against any county, he shall file it with the County Auditor, to be by him presented to the Board of County Commissioners."

1. The fourth section of the act is compiled, as,

"SECTION 5760. No Court shall have original jurisdiction of any *claim* against any county in this State in any manner except as provided in this Act."

These are believed to be all the statutes touching the question.

We have set out the title to the Act of 1879, and the sections to show that the law relates only to 'claims" submitted for adjudication, demands ripe for adjudication and payment. A notice that the "plaintiff expected to do" the iron work, and "expected to receive the pay therefor, direct" from the county "in the same manner (*i. e.* in monthly estimatimates), as said Meyers & Son, would have been entitled to do under their contract," (Transcript p. 25, folio 69), can not be held to fall within the meaning of the Act of 1879.

This brings the discussion to the point whether, as clerk of the Board, serving on or filing with the Auditor a notice, is, in law, notice to or service on the Board.

We undertake to show it is not.

The Board is clothed by the statute with dual powers. By the Acts of 1875 and 1877, compiled as Sections 4243–4–5–6 (page 2, *supra*), the Board is empowered to act administratively for the county in contracting and paying for public buildings. By other sections they exercise judicial powers, when sitting as a court. The Supreme Court of Indiana in many cases has explained clearly, that when the Board acts as a judicial tribunal it is a court, and when it exercises administrative functions it is a corporation with limited powers, requiring the members to be in session and act collectively.

Platter v. *Board*, 103 Ind. 360;
McCabe v. *Board*, 46 Ind. 380;
Board v. *Ross*, 46 Ind. 404;
State v. *Board*, 45 Ind. 505.

This notice was sought to be served upon the Board in its administrative capacity.

In that capacity it is conceded that the Auditor is the clerk to keep a record of their corporate proceedings, as required by Section 5805, set forth above.

No statute of Indiana enacts that notice can be given to the Board, especially in their administrative capacity, by serving the County Auditor, or filing the same with or "in the office of the Auditor."

Now, the Commissioners are not a private corporation, but a public municipality. They do not select or employ the Auditor. The relation of principal and agent does not exist. The power that appoints the members of the Board appoints their clerk. It has been decided:

1. The Auditor can not contract for the Board.

Chopin v. *Board*, 21 Ind. 12;
Potts v. *Henderson*, 2 Ind. 327.

2. It will not be asserted by our brothers that a writ of summons, mandate or other process against the Board, can be served on the Auditor. The uniform practice is, and always has been, to serve the members in term time, recess, or vacation.

3. The Auditor was not made the Agent of the Board by any provision in the contract. On the other hand, payments were to be made on the architect's certificates, "provided the Commissioners concur with the architect in said certificate." (Transcript, p. 7, folio 15.)

Having freed the question from any local distinction, the case comes to this: Is notice to a clerk of a municipality notice to the corporation?

In *Nichols* v. *Boston*, 98 Mass. at p. 44, the Court says:

"The notice given to the city clerk * * was also insufficient to affect the city, because the clerk is but a recording officer, unauthorized to receive, or act upon any such notice."

Leavenworth County v. *Hamlin*, 31 Kan. 105;
Railway Co. v. *Anderson Co.*, 16 Kan. 302;
Harrington v. *School District*, 30 Vt. 155;
Board v. *Eeroyd*, 2 Victorian Law Rep. 45; cited in 27 Moak's Eng. Rep., p. 156, note;
Wharton, Agency, Sec. 184;
Dillon Muncie Corp, Sec. 237, note 1 (3d ed.) p. 262;
Wade on Notice, Sec. 1313 (2d ed.);
See motion for new trial, Transcript, p. 44, folio 118.

We insist that the Auditor is not the agent of the Board, and a notice handed to him is not notice to the members of the Board.

ARREST OF JUDGMENT.

It is apparent upon the face of the record that the County is not accountable. By the Indiana Code the building contract forms a part of the first paragraph of the declaration as it is described in, attached to, and made a part of, the pleading. It is as much a part as if copied in the body of the paragraph.

It is the foundation of the action. It is the promise to pay for the jail found therein that the Diebold Company seeks to enforce a part. And it seeks to enforce a part of that obligation on the ground that the first holder of the promise assigned to it a part of that promise, in consideration of it furnishing part of the material and performing part of the work.

Now, it was expressly stipulated by the County in the building contract that it should not in any manner be made answerable to such a demand.

The seventh item of the building contract (p. 12 *supra*) stipulates that: "The County will not in any manner be answerable to or accountable * * * for any of the materials or other things used, and employed in finishing and completing the said work."

The intent and purpose of this provision is clear. It was to cut off all demands of all other persons against the County to account or answer for materials, labor, and the like, used in the jail, except the contractors themselves.

It can not be said that this clause was to guard only against material-men's notices and liens, because they would not lie, and because if they would, they could not be cut off by contract.

This clause can have no other purpose than this: To prevent all third persons who may furnish materials or labor for any part of the construction from holding the County liable. "Will not in any manner be accountable," means to any third persons as assignees or on orders given, or in any other way. "We will pay you, and no other person," is the express agreement. Any pleading to make the County liable on this contract, by a third person, is, therefore radically bad.

This question arises on the instructions brought in review, and is squarely presented in the motion in arrest, because the declaration is insufficient in law to support a judgment. (Transscript, p. 45, folio 120.)

The recent case of *Avery* v. *Ionia County*, decided by the Supreme Court of Michigan on October 12, 1888, (West. Rep. Vol. 39, p. 742) is quite like this case on the point under present discussion. The county awarded a court house contract to Claire Allen. He then made a sub-contract with Wm. E. Avery to furnish the cut stone work, and was paid from time to time on orders and estimates until a certain time, when there was due him $1,165.55, for which Allen gave him an order, which he gave to C. Waterbury, superintendent of the building committee, who, after keeping it

some time, returned it and refused to pay it, and the county Board thereafter refused also, and passed a resolution to save the committee harmless The building contract provided that "neither the committee nor the county would be liable for work or material provided for the court house." (p. 746.)

Avery sued the committee and the county, and was defeated, and on appeal the case was affirmed, the Court saying, among other things: "The original contract provided that neither the committee nor the county should be held liable for materials furnished or labor performed. * * * Plaintiff was bound to take notice of these conditions. In any view of the case the plaintiff was not entitled to recover."

The third ground for arresting judgment was, that upon the face of the record it appears that if the plaintiff had any right of action at all, the same is in equity and not at common law, "that therefore the trial of said cause was a mistrial, and no judgment can be rendered on the verdict." (Transcript, p. 45, folio 21.)

This position is supported by the following authorities:

Thompson v. *Railroad*, 3 Wall. 134;
Hunt v. *Hollingsworth*, 100 U. S. 100;
Litchfield v. *Ballou*, 114 U. S. 190.

CONCLUSION.

We have sought to present the questions succintly which appear to arise, and have not assumed to speak for the counsel for appellee as to what their grounds may be for resisting a reversal. If they shall assume any position not noticed, we reserve the right to file a reply brief.

The plaintiff in error asks that the cause be reversed.

Respectfully submitted,

ADDISON C. HARRIS,
WILLIAM H. CALKINS,
Attorneys for Plaintiff in Error.

INDIANAPOLIS, Nov. 24, 1888.

Office Supreme Court U. S.
FILED.
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JAMES H. MCKENNEY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 295.

THE BOARD OF COMMISSIONERS OF DELAWARE COUNTY, INDIANA,

VS.

THE DIEBOLD SAFE AND LOCK COMPANY, WILLIAM H. MEYERS, AND EDWARD F. MEYERS.

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Carlon & Hollenbeck, Printers, Indianapolis.

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VS.

THE DIEBOLD SAFE AND LOCK COMPANY, WILLIAM H. MEYERS, AND EDWARD F. MEYERS.

STATEMENT.

We consider it proper to make a statement in order that the court may see the few controlling facts together, divested of that portion of the evidence which the jury found to be unimportant.

As shown in the record and the brief of the plaintiff in error, Delaware County made a contract with Meyers & Son to erect a jail and sheriff's residence in connection therewith; and agreed to pay the sum of $20,000 for said work. The contract is set out in full.

On the 6th day of March, 1882, the Diebold Safe and Lock Company agreed with Meyers & Son to do the iron and chrome steel work upon such jail proper, according to the plans and specifications set out in the contract between Meyers & Son and the County,

and agreed to take the County for pay. The work was to be done for $7,700, which was the exact amount of the architect's estimate of the cost of that part of the work. The contract is set out in full in the transcript on pages 5 and 6, folio 11 and 12, and in the brief of the plaintiffs herein, on pages 2 and 3. Therefore, we will not copy them here. The Diebold Safe and Lock Company, gave the County notice of this contract and its contents in April, 1882. Again the Safe Company filed in the auditor's office of the County of Delaware and brought to the attention of the County, through the proper County agents, the Auditor and County Commissioners, a written copy of this contract, during a session of the Board of County Commissioners on the 6th day of December, 1882. And still again the Safe Company gave notice to said Delaware County, of said contract in April or May, 1883. See Record, pages 25 and 26, folio 68 to 71. All of these notices were given prior to the time that the Safe Company did any work upon said building and before the building was ready to have put therein the iron-work and steel cells that the Safe Company had agreed to construct.

On the 28th day of August, 1883, the Safe Company—having previous thereto, at its shops, in Canton, Ohio, prepared the iron and chrome steel, cells, and other work by it to be done under its contract—shipped the same to Muncie, Indiana, where such jail was being erected, and commenced putting said work into position in said building, and completed the work in all things according to the plans and specifications set out in the contract between the County and Meyers, on the 24th day of September, 1883, completing the work in twenty-seven days. The Safe Company has never received a cent for this work (see Record, page 29, folio 77), nor was there ever any estimate upon, or payments made by, the County to any one on account of the iron and steel work. See Record, page 29, folio 80.

Before the Safe Company commenced work upon the jail, viz., in the spring of 1883, and after the construction of the building was well under way, the County took possession of both the building and work thereon, refused to pay any more money to Meyers & Son, and placing one John Perry in charge, required him to pay for work and materials therefor upon orders therefor from Meyers. (See Record, page 27, folio 75.) (So that when the Safe Company commenced its work the County was not only in charge of the building,

but had discharged Meyers and was itself assuming and paying for all work done on and materials furnished for the construction of the same. It promised to pay appellee (Rec'd 26 Folio 70)

Afterwards, on the fifth day of September, and while the Safe Company was doing its work upon the building thus in the charge of the County, the County made a settlement with Meyers of all matters connected with the building of said jail.

In this settlement the County charged Meyers $4,500 damages sustained for delay in completing said jail, which was deducted from the contract price; and the parties estimated the amount necessary to finish and complete said jail, which amount being added to the $4,500, and what had theretofore been paid, there was found to be a balance due Meyers, which balance was paid. See Record, p. 28, folio 76, 77. At the time of this settlement with Meyers one Secrist, who had put in the stone foundation for the jail, and had filed a mechanic's lien against the County therefor, was prosecuting his claim for $2,000; and it appears that there was a compromise settlement made at this time, for the County agreed with Meyers & Son that if Secrist was defeated in his claim, they would pay him said $2,000, which, together with the estimated cost of completing the jail, the damages charged to Meyers, the money then paid and the previous payments, would make $2,000 more than the contract price. See Record, p. 28, folio 77, 78. The County defeated Secrist's claim, but never paid Meyers or anybody else said $2,000, so that, in fact, the jail was taken off the hands of the contractor by the County before the Safe Company commenced its work, and the County had fully settled with Meyers & Son, retaining the money to pay the Safe Company before it had completed its work. The County received $4,500 as liquidated damages, when it had only sustained $25. See Record, p. 29, folio 78, 79.

The County paid out to Meyers & Son, or to his order, before the time Perry took possession of the work for the County in the spring of 1883, the sum of $8,300. See Record, p. 28, folio 76. During the time Perry had charge of the work he paid out $784. See Record, p. 27, folio 75. There was due the Safe Company for the iron and steel work according to the contract and estimates of the architect, the sum of $7,700, making $16,784, which, when the County pays the Safe Company, is the full amount that it ever legitimately and honestly has paid, or would have to pay for the

erection of said jail, except the unknown amount paid to Meyers at the settlement of September 5, 1883. In the nature of things, the iron work and steel prison cells must be put into the building after it is otherwise completed, so that when the work was within 20 days of completion, and the Safe Company was at work thereon, the County, knowing the exact sum that would be required, and having assumed to complete said jail, then Meyers & Son and the County "estimated the amount necessary to finish and complete "said jail, and said amount, together with the said sum of $4,500, "taken as liquidated damages aforesaid, was deducted from said con- "tract price for said jail, and the balance then estimated to be due "said Meyers & Son was then paid to them by said County, and said "jail was taken off their hands by said Board." Record, page 28, folio 76, 77.

There was no evidence offered on the trial tending to contradict most of these facts. The mistake in the statement and argument of counsel for plaintiff in error is that they proceeded as though this court would review questions of fact herein.

From the facts proven in this case we find: First, that before the Safe Company commenced its work on the jail the County had full knowledge of the fact that it had agreed with Meyers & Son to do the iron and steel work according to Meyers & Son's contract, and if it did so that it was to receive pay from the County instead of Meyers & Son, and consented that it should do the work. Second, that before the work was commenced the County took control of said work and building, agreeing to pay the Safe Co. for work and materials put therein. Third, while the Safe Company was doing said work the county settled with Meyers & Son, retaining money enough to complete the jail, deducted the damages, paid Meyers & Son the balance, and discharging Meyers & Son and their bondsmen, assumed to settle all matters as to building the jail.

PLEADINGS.

The claim must be filed with the County Commissioners, and can not be sued upon or collected in any other way. The statute reads as follows:

"SECTION 5758—FILING CLAIMS.—1. Whenever any person or "corporation shall have any legal claim against any County, he shall "file it with the county auditor, to be by him presented to the Board "of County Commissioners." This section makes the auditor the

agent to present the claim, and prescribes that he is the only medium to get it before the commissioners.

SEC. 5759—ALLOWANCE OF CLAIMS.—2. The County Commissioners shall examine into the merits of all claims so presented, and may, in their discretion, allow any claim in whole or in part, as they may find it to be just and owing.

"SEC. 5760—SUIT FOR CLAIMS.—4. No court shall have original "jurisdiction of any claim against any County in this state in any "manner except as provided in this act." Claims must be thus presented before any suit can be brought.

Pfaff v. *State, ex rel.*, 94 Ind. 539.

The second paragraph of the complaint was dismissed; therefore we speak of the first paragraph as the complaint.

Before the March term of the Board of Commissioners 1885, the Safe Company filed their claim with the auditor of Delaware County, to be duly presented according to the forms of law to the Board of Commissioners at their March term. This complaint, which may be found on pages 2, 3 and 4 of the Record, sets out the contract of the County with Meyers, the contract between Meyers and the Safe Company and alleges, (see page 3, folio 6,) "that said contract was entered into and said assignment was made "with the full knowledge and consent of said Board, and that, with "the kupwledge and consent of the Board of Commisstoners, said "Diebold Safe and Lock Company proceeded, in pursuance of said "contract, to do said work and furnish all the said materials in all "things, as agreed by it, and in all things, in accordance with the "terms and conditions of said contract between said Meyers & Son "and said Board of Commissioners, and in all things according to "the plans and specifications therefor, as adopted and agreed upon "by said Board, and to the acceptance of the architect and superin-"tendent of said building and of said Board."

The Board of Commissioners saw fit to reject said claim and refuse to pay the same; whereupon an appeal was taken to the Circuit Court of Delaware county, as provided by law.

The only thing done in the Circuit Court was to file an application to remove the case to the Circuit Court of the United States, which was refused, or rather the court refused to make any entry in the matter; and the record was filed in the Circuit Court of the

United States, which court took jurisdiction of the cause, and the various pleadings were filed, and the court entered the various rulings, findings, and judgments set out in the record.

The cause was transferred to the chancery side of the court, and most of the rulings and motions herein were made and filed while the case was pending on the chancery docket (see Record, page 19, folio 48); and therefore can not be reviewed in this court by a bill of exceptions.

Natines v. *Johnson*, 24 Howard, 195.

ARGUMENT.

What are the legal liabilities and duties created between the parties, arising from these facts? The County can not deny notice and even acceptance, for its own superintendent had possession of the building at the time the work was done, to look after all the work and pay therefor out of the money due on the original contract with Meyers & Son. While it was being done, the County made a settlement agreeing to pay for all such work, and there was never an estimate made by the architect for any iron or steel work, and all evidence that the County ever paid anything like the full contract for the jail and did not retain and have in its hands sufficient to pay the Safe Company's claim, was utterly at variance with every other circumstance shown to exist, and directly contradicted by the weight of evidence upon which the jury found for the Safe Company.

This settlement with Meyers & Co., the Board had a right to make; it had a right to thus take the buildings off of their hands, relieve them and their bondsmen from further liability, and complete the jail even if it cost the County more than the price agreed upon, provided the County got the jail and benefit of such expenditure. The commissioners did in fact do this, but charged all expenses to Meyers & Son, according to the contract. The action of the county in refusing to pay, after retaining the money belonging to the Safe Company in this settlement, is greatly in contrast with that of the Board of Commissioners of Carroll county, Indiana, in making settlement with the builder of its jail, by paying him $4,430.73 more than the contract price, because such payment was just; which action was sustained by the Supreme Court of Indiana, on the

ground that it was an act of justice if not of good financial management.

See *The Board of Commissioners of Carroll County* v. *Richards et al.*, 54 Ind. 153.

On page 158 and 159 the court says:

"The allowance does not seem to have been placed upon the "ground that there was any *legal* obligation resting upon the county "to pay beyond the terms of the contract, but upon the ground of "natural equity. The county, speaking through its Board of "Commissioners, having got the benefit of Farman's work and ma- "terials, under such a contract as produced a loss to him, was will- "ing to partly compensate him for that loss, and thereby share it "with him. This, the Board, although not bound, had the un- "doubted right to do; for, as we have seen, the Board has the "right to make allowances at their discretion."

It is asserted by counsel for plaintiff in error in their brief that because the law requires public bids to be made for contracts for the erection of county buildings, and requires bond from the contractor, and has held invalid mechanics' liens thereon, no assignment could be made of a part, or the whole of the contract; that the County Commissioners and all other persons are legally excluded from doing anything else but sue upon the bond in case of failure of the contractor, and the Commissioners can not in any different way complete their jail. Public policy is invoked to sustain this legal proposition. The courts of the state of Indiana have held otherwise, and the case above, and others hereafter cited, abundantly controvert these positions. Since the case at bar was decided in the court below the Supreme Court of our own state has passed upon this question again in the case of *The Brass Foundry, etc.*, v. *The Board of Commissioners of Parke County, Indiana*, 115 Ind. 234 (not yet out). It so happened that one of the Meyers that contracted for the Delaware County jail also contracted for the Parke County court-house and jail. They failed in the contract and the Commissioners took it off their hands, as was done in this case, and the same question of public policy and legal restraint was raised in that case that are argued and relied upon by counsel in this case. But the court held that the County was bound for all material fur-

nished and labor done upon said jail after they took possession of the work. On page 244 the court uses this language:

"The doctrine of *ultra vires* does not absolve municipal corporations from the principles of common honesty.

"When a corporation has received the money or property of an individual, *under color of authority*, and has appropriated it to its necessary and beneficial use, it will not be heard to assert its want of power to pay the value of what it has received and still retains.

"In such a case where the initiatory steps have been taken which authorize a municipality to proceed with a public work, persons who furnish money, labor or materials to the municipality, which are actually used in the work and retained by it, become equitably entitled to recover. *Bicknell* v. *Widner School Tp.*, 73 Ind. 501, and cases cited; *Wallis* v. *Johnson School Tp.*, 75 Ind. 368; *First National Bank* v. *Union School Tp.*, 75 Ind. 361; *Pine Civil Tp.* v. *Huber Manf'g Co.*, 83 Ind. 121; *Sheffield School Tp.* v *Andress*, 56 Ind. 157; 1 Dill. Munic. Corp., section 464, and note."

We quote at length from these decisions in order to show that according to the laws of Indiana the county is not bound by iron rules compelling it to follow exactly the contract and pursue the remedies laid down in the agreement with Meyers & Son; but that it can be bound by any modifications thereof that is just.

WHO WERE NECESSARY PARTIES DEFENDANT?

This is one question, the discussion of which in this case properly precedes and settles several of the other questions so elaborately argued by the counsel for the plaintiff in error. The foregoing facts and opinions of the Supreme Court bring us directly to it. It must be remembered that we could not make any other defendants parties to the claim filed before the Board of Commissioners, excepting the County itself; that the Indiana statutes compelled us to file the claim there; and, as soon as the case was brought into the Circuit Court, it became our duty under the law, in order to procure a removal, to make the application.

For the sake of argument, we will concede that the cause of action stated in the second paragraph of the claim filed before the Board of Commissioners, by the statute of Indiana, would require Meyers & Son to be made nominal parties to answer as to their in-

terest. But that paragraph was afterwards dismissed, and, therefore, as we conceive, has no more to do with the case than if it had never been filed; and, as we have before stated, when that paragraph was dismissed, for all legal purposes of this case, Meyers & Son were dismissed with it. We quote from Desty's Federal Court Practice and Procedure, section 639, sub-section:

"On removal in law cases pure and simple no repleader is necessary; but when the relief sought is both legal and equitable, plaintiff must replead in the federal court. So where a suit in a state court unites legal and equitable matters, a repleading is necessary to frame the pleadings anew, so as to make it distinctively a suit at law or one in equity, or to divide it into two suits, one at law and the other in equity. (*Green* v. *Custard*, 23 How. 484; *Thompson* v. *Railroad Cos.*, 6 Hollingsworth, 100 U. S. 100; *Akerly* v. *Vilas*, 2 Bliss. 110; *Fisk* v. *Union P. R. Co.*, 8 Blatchf. 299; *Dart* v. *McKinney*, 9 Blatchf. 359; *Sands* v. *Smith*, 1 Dill. 290.) And the federal court is competent to make all orders necessary to mold it into a legal or equitable case, or to recast it into two cases, one at law and the other in equity. *La Mothe Manuf. Co.* v. *Nat. Tube Wks.*, 15 Blatchf. 432; *Sands* v. *Smith*, 1 Dill. 290. A law action must proceed as such, although brought in the name of the real party in interest instead of the party holding the bare legal title. *Thompson* v. *Railroad Cos.*, 6 Wall. 134; *Weed Sew. Mach. Co.* v. *Wicks*, 3 Dill. 261; *Bushnell* v. *Kennedy*, 9 Wall. 391; *Knap* v. *Railroad Co.*, 20 Wall. 117; *Wood* v. *Davis*, 18 How. 467; see *Suydam* v. *Ewing*, 2 Blatchf. 359."

Therefore a dismissal of the second paragraph took Meyers & Son out of court and left no necessity for their being made parties under the state practice or any other practice.

What is the cause of action stated in the first paragraph of the complaint filed before the Board of Commissioners and upon which the case was tried in the United States Circuit Court? The contract between Meyers & Son and the Safe Company was in the nature of an order or draft upon the County. It is true it is not such an order or draft as is negotiable or as implies a consideration; but it is such an order or draft for the payment of a definite sum of money, which, being assented to by the County according to the stipulations in the contract itself, amounts to an acceptance on the part of the County, and renders the County primarily liable to the

Safe Company. It notifies the County: First, that if the Safe Company pays the consideration to the County; that is, if it does the work for the County therein set out, then the County is to pay the money that would be due the drawers of the order (or Meyers & Son) to the Safe Company; and that it is to be paid to the Safe Company at the times and upon the exact terms that it would be due Meyers & Son if they had personally done the work. Meyers & Son did not agree to pay the Safe Company anything, even though it did the work. See Record, p. 5, folios 11, 12. This is the view of the instrument taken by Judge Woods in his instructions. See Record, p. 36. What kind of acceptance of such a contract and order as this will bind the county and make it alone liable?

It is alleged in the complaint "that said contract was entered into "and said assignment made with the full knowledge and *consent* of "said board, and that, with the knowledge and *consent* of said Board "of Commissioners, said Diebold Safe and Lock Company proceeded, "in pursuance of said contract, to do said work and furnish said "materials, and did do the said work and furnish all the said materials "in all things as agreed by it, and in all things in accordance with the "terms and conditions of the said contract between said Meyers & "Son and said Board of Commissioners, and in all things according "to the plans and specifications therefor as adopted and agreed "upon by said Board, and to the acceptance of the architect and "superintendent of said building and of said Board."

If the county, through its Board of Commissioners, consented to said contract, knowing its provisions, and then permitted the Safe Company to go on and do the work, which was the only condition in the order, it places itself in the position of receiving the consideration, and is bound by a promise to pay the money. It makes itself primarily liable to the Safe Company, and a suit could not be maintained against Meyers & Son because of said work, nor could Meyers & Son maintain a suit against the County for any of the money due for said work. The consent of the County that the Safe Company may go on and do the work under the agreement is all of the acceptance it could legally make of such a contract, and the declarations in the claim filed against the County that the County consented to this contract, and did the work with the *consent* of the County is an averment of an acceptance of the order to pay the

money to the Safe Company, and in law is as valid as though the County Commissioners had written upon the back of this contract these words: "We agree that if the Safe Company does the iron and chrome steel work upon the jail according to the contract with Meyers & Son, we will pay them instead of Meyers & Son."

The case of the *Board of Commissioners of Howard County* v. *Jennings*, 104 Ind. 108, is in point.

A section of the statute makes it the duty of township trustees, as agents of the county, upon learning that any one is sick or disabled or unable to take care of himself, to inquire into the case and grant proper relief, which relief is entirely within his discretion. One Davis was hurt and unable to care for himself, and Jennings, his employer, cared for him at his own home. Soon after the injury Jennings saw the trustee and informed him of the condition of Davis. "The trustee gave no answer except that he would see about it." Afterwards the trustee told Jennings to make out a bill and he would recommend its payment. The county commissioners refused to pay.

On page 112, the court says:

"We think, therefore, that upon the evidence the court below may well have found, as it unquestionably did, that the services were not voluntarily performed, but that they were peformed under the *direction* of the township trustee."

The acceptance of such orders may be made in parol, and the drawer of the order or the assignor of the money is not a necessary party to the suit. The County became the sole debtor.

Louisville, Evansville & St. Louis, R. R. Co. v. *Caldwell*, 98 Ind. 245.
Bird v. *McElvaine*, 10 Ind. 40.
Marsh v. *Low*, 55 Ind. 271.

The County Commissioners are a corporation and have the authority to bind themselves by parol.

McCabe v. *The Board, etc.*, 46 Ind. 308.
Board, etc. v. *Ritter*, 90 Ind. 362.

On page 370, of the last case, the court says:

"We do not find any case which decides that the Board, "when acting as a corporation merely, must enter its action of rec-

"ord, to make it binding upon the County, or that requires that, "in proving such act, it must be proved by a record made under "the direction of the Board. We have not discovered anything in "the statute relating to the Board of Commissioners, or its powers "and duties, which would seem to prevent it from contracting "within its legitimate sphere as other corporations may contract. "If we are correct in this view of the question, the Com- "missioners may contract in the same manner as any other "corporation. The rule relating to the manner in which a corpor- "ation may bind itself has in modern times undergone a great "change. Angell & Ames on Corporations, section 237, the rule "is laid down, 'that the acts of a corporation, evidenced by a vote, "written or unwritten, are as completely binding upon it, and are "as complete authority to its agents as the most solemn acts done "under the corporate seal; that it may as well be bound by ex- "press promises through its authorized agents, as by deed; and "that promises may as well be *implied* from its acts and the acts of "its agents as if it had been an individual.' *Ross* v. *City of Mad-* "*ison*, 1 Ind. 281; *Board, etc.* v. *Slatter*, 52 Ind. 171; *Halstead* v. "*Board, etc.*, 56 Ind. 363."

When it is remembered that the County not only assented to the contract between the Safe Co. and Meyers & Son, but that the Safe Co. performed the labor and did the work for the County, that the County accepted the work after such assent, that the work was done in all things according to the contract with Meyers & Son, and the County now has the benefit thereof; that the County had taken possession of the building before the work was done; and not only this, but that the County made a settlement with Meyers & Son, and retained the money to pay for completing the jail, surely it is not in the mouth of the County to assert that it is not primarily liable, and the only person liable to pay the Safe Company for said work, and, therefore, the only necessary party defendant to an action for its recovery. This being true, it is a full answer to the assignment of errors and argument of counsel for the plaintiff in error upon all the subjects set out in the assignment of errors and argument of counsel herein, excepting the exclusion of evidence offered.

If the County became and was primarily liable to the Safe Company, then no other parties were necessary or proper to the action, and all the parties were residents of different states, and it could not

be against public policy. Nor was the cause improperly tried on the law side of the court; nor was the assignment and contract between Meyers & Son and the Safe Company and with the County the foundation of the suit further than to set out how the County became primarily liable to the Safe Company. Therefore the instructions given by the court below were correct, and all the errors complained of fall together.

These were the positions taken by the trial court; and in the further argument of the cause we will first answer the alleged error in excluding the evidence offered, and then, without admitting that it is necessary to a decision of the case, take up the other subjects presented in the brief for plaintiff in error.

EVIDENCE OFFERED AND REJECTED.

Copies of the pleadings in a suit of the Safe Company against Meyers & Son in the United States Circuit Court for the district of Indiana, which were offered in evidence and refused by the judge, are set out in the record herein on pages 30, 31, 32 and 33. The record states nothing more than what is set out in the pleadings in this case, except that the first paragraph declares upon an account for furnishing the material and doing the work upon the jail, giving a bill of particulars. The prayer (contained on page 31 of the record) is in these words: "Wherefore she prays judgment on the two paragraphs in said complaint for the whole sum of such indebtedness as is herein shown, and interest thereon since September 5, 1883, and for all other proper relief, etc."

The point we make as to this testsmony is that it is the admission of no fact against the Safe Company, the pleadings containing the same averments that is shown in the declaration in the suit at bar, setting out the same contracts, but seeking to recover from other parties upon the exact grounds that we seek to recover against the County in this suit. And if the plaintiff or his attorney mistook the law as applicable to the facts, and supposed that they could recover off of Myers, the record would only show the mistake of law on the part of the attorneys rather than the admission of any fact on the part of the Safe Company. That could in no way prejudice the company in this case. Therefore, the record is totally irrelevant and immaterial. The written contract set out in this suit is the same one set out in that suit. There is nowhere in that suit

an intimation that the Safe Company made any admission of a single fact different from the pleadings set out in this cause. And it would not be competent to offer any evidence that the Safe Company or its attorneys in any way misconstrued the written contract and order, or misunderstood its legal rights and remedies. For these reasons we do not deem it necessary to cite authorities upon this point.

REMOVAL FROM STATE COURT.

The restrictions of the judiciary act as to the jurisdiction of the Federal Courts do not apply to cases brought into those courts under the "removal acts." A suit may be brought into the Federal Court by removal, although it could not not have been instituted in that court in the first instance, and it may be proceeded with unaffected by the provisions of the practice acts limiting the jurisdiction of those courts.

Warner v. *Pennsylvania Co.*, 13 Blatch, 231.
Lawrence, Waterbary & Co. v. *City of Loredo*, 3 Woods, 371.
Bradley v. *Levee Commissioners*, 1 Woods, 254.
Binney v. *The Bank*, 5 Blatch, 107.
De Leveaga v. *Williams*, 5 Sawy. 574.
Leutz v. *Butterfield*, 7 Daly, 24.
Ayers v. *Western Ry. Co.*, 45 N. Y. 260, p. 264.
Bushnell v. *Kennedy*, 9 Wall, 387.
City of Lexington v. *Butler*, 14 Wall, 282.
Gaines v. *Fuertes*, 92 U. S. 10.
Bell v. *Noonan*, 17 The Reporter, 422.
100 U. S., 447.

In the case cited from J. Woods, 371, it is held that where a contract between citizens of the same state, even though the contract is neither a promissory note negotiable by the law merchant, nor a bill of exchange, has been assigned by one of the parties to the same to a citizen of another state, who has brought suit thereon in a state court of the state in which the defendant is a resident, the suit may be removed to the federal court; that this question is governed by the provisions of the removal acts and not by the limitation as to original jurisdiction. In *Barclay* v. *Levee Commissioners*, 1 Woods,

254, it is held by Bradley, J., that the removal act "overrides" the limitation of the judiciary act as to jurisdiction.

The Supreme Court of the United States has several times held that suits brought by an assignee of a contract brought in the State courts may be removed to the federal court, although on account of the citizenship of the assignor they could not have been brought in the first instance in that court.

See *City of Lexington* v. *Butler*, 14 Wall, 282, where it is said that since the case of *Bushnell* v. *Kennedy* all doubt upon this subject is removed.

And it is further held that, if the right of removal is once perfect, it can not be taken away by any amendment either in the federal or state court.

See Desty Fed. Proc., section 639, and cases cited.

Bump in his Fed. Proc., p. 178, says:

"A suit instituted by an assignee of a chose in action may be removed, although the debtor and the assignor are citizens of the same state, and the case may be removed, although it is brought by the assignee of a chose in action in his own name in pursuance of a state law." See also cases cited.

Desty Fed. Proc. 228, and cases cited. Dillon on Removal of Causes, section 53*a*.

Bump. Fed. Proc., p. 194, says:

"A non-resident plaintiff may remove the case when some of the adverse parties are citizens of the state where the suit is brought, although one of the defendants is a citizen of another state, provided that he is not a citizen of the same state as the plaintiff." The Meyers, having filed disclaimers, and having, in fact, no interest in the action, if parties at all, were only nominal parties, whose citizenship can not affect the right of plaintiff to remove the case; but at most that defendant can claim, the case is to be considered as if they were parties below, as far as the right to remove is concerned, and we have seen that the case was properly removed, notwithstanding their citizenship, and even admitting them to be necessary parties.

The fact that W. H. Myers lived in Michigan does not affect the right to remove the cause. See

Hinckley v. *Ryan*, 1 Deady, 224, and cases cited in *Bump, supra.*

Waldon v. *Skinner*, 11 Otto, 577.

IS THE BOARD OF COUNTY COMMISSIONERS A COURT?

The fact that the claim was filed before the Board of Commissioners under the requirements of our statute, and the removal was taken after the appeal to the Circuit Court does not affect plaintiff's right to remove the cause and proceed with it in this court. The Board of Commissioners is not a court within the meaning of the term as used in the removal act, and the refusal to allow the claim was not a "trial" within the meaning of that act.

This exact question has been squarely met in several of the decided cases. One of these is

Fuller v. *County of Colfax*, 14 Fed. Rep. 177.

In that case the plaintiff had filed his claim with the board of commissioners of Colfax County, Nebraska. It was disallowed and, he appealed to the District Court of that county, and then removed the case to the Federal Court. On motion to remand it was held that the removal was properly had.

The statutes of Nebraska (compiled Statutes 1881, p. 181 sec. 37) provide that claims against the County must be filed with the Board, and if disallowed, the claimant must appeal. The remedy by appeal is exclusive, no original action can be maintained, and the determination of the Board is an adjudication and a bar to further proceedings unless appealed from.

Brown v. *Otoe Co.*, 6 Neb. 111, p. 116.
Clark v. *Board of Buffalo Co.*, 6 Neb. 454.

The statute is almost a copy of the Indiana statute, and the proceedings were identical to those had in this case.

Just as strong is the case of *Gurnee* v. *Brunswick Co.*, 1 Hughes, 70, decided by Waite, C. J., which was also directly in point.

The Board of Supervisors in Virginia under their laws occupy the same position as the Board of Commissioners under ours. The statutes also contain the same provisions relating to the filing of claims with the Board and appeals from their decisions.

There the same proceedings were had as in this case. The case is, therefore, precisely in point, as is the one above cited.

Being unable otherwise to present the argument in this case so forcibly, we have ventured to make rather long quotations from it, beginning on page 276.

Referring to the effect of the proceedings before the Board and the appeal to the Circuit Court, the court says:

"Under the appeal the case does not come up for review, but for "original adjudication. All previous to the appeal was preliminary to the commencement of the suit. There is nothing in the "form of commencement which makes the proceeding anything "else than a suit. The form of commencing actions is always "within the control of the legislature. It is 'due process of law' "within the meaning of the constitution of the United States, if "there is lawful notice to appear and time and opportunity to answer and defend. The form of the notice is not important if "there be notice in fact. The states may prescribe the form of remedy on their own courts in every case. Here a demand is required before a suit can be commenced. There is nothing unusual or inequitable in this. It is no more than providing that "contracts of the county for the payment of money are contracts "to pay after demand actually made in the manner required by "law. Upon such contract demand must always be made before "suit is brought. The provision further in this case is that after "refusal to pay upon demand, suit shall be commenced in a certain "form or not at all. This is certainly within the power of the legislature, so far as it relates to the tribunals of the state. From "this it is apparent that the case, at the time of the removal, was "pending in the state court under its original and not under its "appellate jurisdiction, and that the first ground urged in support "of this motion is not sustainable."

Rathbone Oil Tract Co. v. *Rauch*, 5 W. Va. 79, is also directly in point.

See also *Kellogg* v. *Hughes*, 3 Dillon, 357.

Johnson v. *Monell*, 1 Woolv. 390.

Home Ins. Co. v. *Dunn*, 19 Wall, 214, etc.

In addition to the reasons stated in the cases cited above, it might be added that the appeal from the decision of the Board vacates its order. The case comes up in the Circuit Court for trial *de novo* and the jurisdiction of the Circuit Court is *original* and not *appellate*. It stands for trial just as if it never had been tried. And it has been held that where there has been a trial in the Circuit Court and an appeal to the Supreme Court of the State re-

sulting in a reversal of the judgment, the case may then be removed to the federal court.

SHOULD THE CAUSE HAVE BEEN TRIED AS A SUIT IN EQUITY?

The position of counsel on this subject has been reversed since the case was filed in the Circuit Court of the United States. The record shows that the case was filed on the equity side of the court, and that it was changed to the law side by the agreement of counsel. The fact is that the agreement to change was entered into at the solicitation of A. C. Harris, one of the opposing counsel, because he asserted that it was a law case, and desired to try it by a jury. He was right in that position, as we believe, and will now try to show.

The assignment, it is true, is an equitable assignment. That is to say, it is such an assignment as would not at common law convey the legal title to the assignee, although it would vest in him the beneficial interest. But there is no other feature of the case which would bring it within the jurisdiction of equity. The remedy sought is a legal remedy. The amount sought to be recovered is a definite sum, requiring no accounting. We do not think that the mere fact that the assignment is equitable as distinguished from one denominated legal, makes the case one for equitable rather than legal jurisdiction. At common law the courts so far recognized these equitable assignments as to enforce them in action brought by assignee in the name of his assignor, and they would not permit the assignor to control the action, but would protect the assignee's rights as against him if need be. The law so far adopted the equity doctrine in regard to such assignments as to enforce the rights of such assignee in an action at law brought by him in the name of his assignor, and to allow such action to be prosecuted by the assignee for his own benefit. He was not compelled to resort to equity to obtain a remedy. Practically, then, in most cases, the distinction amounts to but little. The courts of law will recognize and protect the equitable assignment.

Jones v. *Witter*, 13 Mass. 304.
Conway v. *Cutting*, 51 N. H. 407.
Garland v. *Harrington*, 51 N. H. 409.
Parsons v. *Woodward*, 2 Zabr. 196.

See *Carr* v. *Waugh*, 28 Ill. 418. p. 423; *Morris* v. *Cheeny*, 51 Ill. 451, p. 454; 10 Cal. 579; *Walker* v. *Brooks*, 8 Clint. L. J. 149.

But the courts have gone further. They have not only held that the assignee may have a remedy at law, but they have held, on the principle that equity will not assume jurisdiction where there is an adequate remedy at law, that the assignee can not proceed in equity to enforce for his own use the legal right of his assignor, merely because he can not sue at law in his own name. If the right is a legal right, he has a full remedy in an action at law in the name of his assignor. See cases above cited.

Hayward v. *Andrews*, 16 Otto, 682.
N. Y. Guaranty Co. v. *Memphis Water Co.*, 17 Otto, 205.
1 Wash. C. C. 424.
Thompson v. *Central Ohio Ry. Co.*, 6 Wall. 134.

We think, therefore, that at common law, the plaintiff might have brought and maintained this action for his own interest in the name of his assignor. But under the Indiana statute, the action could not be maintained except in the name of the legal party in interest—the plaintiff. But this provision does not affect the character of the action, or make that a case for equitable cognizance which otherwise would be for legal jurisdiction. The action is still legal. 7 Gill, v. J. 114.

But the provision of the State code as to parties is recognized and adopted on the law side of this court. If the action in the state court is in its nature legal, it retains that character when brought into the federal court by removal.

Desty, 6th edition, page 226, says:

"A law action must proceed as such, although brought in the name of the real party in interest, instead of the party holding the bare legal title."

Dillon Removal of Causes, 3d edition, section 43, says:

"Where the case made by the pleadings in the state court is in its nature a law action, it must, when removed to the federal court, proceed as such, and may do so (where the action is a purely legal one) although it is brought in the name of the real party in interest (as authorized by the State codes), instead of the person holding the bare legal title."

See also the cases cited by these authors in support of the text. A case in point is that of *Thompson* v. *Central Ohio R. R. Co.*, 6

Wall. 134. There the action was brought in the State court in the name of the real party in interest under the State code. His interest was only an equitable interest at common law, and on the removal to the federal court the cause was transferred to the equity side of the court, because, as the parties thought, the equitable owner could only prosecute his remedy at equity, he having no right to proceed at law in his own name. But the Supreme Court held that equity had no jurisdiction, that the jurisdiction of the court was on the law side only, and that the plaintiff had the right to proceed at law in his own name. See also *Hayward* v. *Andrews*, 16 Otto, 672; *N. Y. Guaranty Co.* v. *Memphis Water Co.*, 17 Otto, 272, etc.

We think the principle announced in these cases governs in the case at bar, and that the case was properly tried at law. In fact, it seems that a trial in equity would not have been authorized, and that the jurisdiction is at law only.

This principle is recognized in the early case of *Robinson* v. *Campbell*, 3 Wheat. 212. In that case, after sayiug that the distinctions between law and equity are still recognized in the federal courts, they say: "Consistently with this construction, it may be admitted that where by the statute of a state a title, which would otherwise be deemed merely equitable, is recognized as a legal title, or a title which would be good at law, is under circumstances of an equitable nature declared by such statute to be void, the rights of the parties in such a case may be as fully considered in a suit at law in the courts of the United States as they would be in any State court."

In *Van Norden* v. *Morton*, 99 U. S. 378, it is held that where a new right is given by a State statute, the jurisdiction in such cases in the federal courts as between the law and equity sides depends upon the nature and character of remedy. That unless it clearly comes under some of the recognized heads of equity jurisdiction, it must be held to be at law. 6 Wall. 134, commented upon and approved. The same effect is *Chicago Railway* v. *Whitton*, 13 Wall. 270.

It is there held that the federal courts at law have jurisdiction of an action brought by an administrator for damages for injury resulting in the death of his intestate, although such right is wholly

dependent upon the state statute and was not given at common law. See also *Kohl* v. *U. S.*, 91 U. S. 367.

Root v. *Ry.* 105 U. S. 189 was a suit by an assignee of a patent right for an account for profits and damages against an infringer. Court held that such action must be at law, and said:

"In order to sustain an action for such cause in equity there must be circumstances which could render an action at law for the recovery of damages an inadequate remedy."

In *Wright* v. *Ellison*, 1 Wall. 16, it is held that a mere legal remedy will not be enforced in suit in equity.

In *Grand Chute* v. *Vinegar*, 15 Wall. 373, it is said that the jurisdiction in equity is exceptional, that the parties have a constitutional right to trial by jury, and must not be deprived of it where the law is competent to afford a remedy.

See *Hayward* v. *Andrews*, 16 Otto, 672; *Guaranty Co.* v. *Water Co.*, 17 Otto, 205.

Under the rule stated in *Robinson* v. *Campbell*, *supra*, by the Supreme Court, the jurisdiction of this case is upon the law side.

Here our title, which would otherwise be deemed only equitable, is recognized by our state statute as legal. That statute requires the suit to be brought in our name. And as was said in the case cited. "The rights of the parties in such a case may be as fully considered in a suit at law in the courts of the United States as they would be in any State court."

We call the court's attention to this averment of the complaint and to these authorities. We invite attention to this proposition. The other argument upholding the jurisdiction of the law side is founded upon our statute and decisions under it, which construction is recognized by the federal courts.

The effect of the code enactment is to extend the equity doctrine to all cases of assignments, and to make the title, which otherwise would be deemed merely equitable, recognized as a legal one; in other words, to pass the legal title as well as the beneficial interest.

Estee Code Pleadings, sec. 334.
Bliss Code Pleading, sec. 47.
Pomeroy's Remedies and Remedial Rights, sec. 145.

See also the case in 6 Wall. cited above, and the Indiana cases referred to in another part of this brief.

In Pomeroy's Equity Jurisprudence we find a clear statement of

the effect of these code provisions. See vol. 3, sec. 1277, *et seq.* In sec. 1277 the author says:

"In England and all of the American states which have adopted the reformed procedure, the direct, absolute, or what may be called *legal* assignment of legal things in action which are assignable, confers on the assignee a purely *legal* interest, and he can only sue in his own name by a civil action, which is to all intents legal in its character, so that under these circumstances there is no occasion for the equitable jurisdiction."

And in a note to this section by the author, it is said:

"This conclusion follows from the abolition of distinctive actions at law and suits in equity. If, for example, a person having a particular fund or amount due him in the hands of A., should give his creditor B. an order on A. for the whole, or for any definite part of the fund, this order would operate as an equitable and not a legal assignment. The assignee B. must bring an action against A. in his own name. As this action would be brought for the recovery of a certain sum of money, as it would involve no accounting, and as the recovery would depend upon no equitable doctrines except the equitable character of the assignment, I have no doubt that the action would be in effect legal, and governed by the rules applicable to legal actions; as for example, it would be triable by a jury."

This conclusion of Pomeroy's is directly in point, and, if correct, settles this question. We think it is correct upon principle, and that the adjudications, so far as there are any upon the subject, are in harmony with it.

Again, in Pomeroy's Remedies and Remedial Rights, at sec. 154, the case of *Field* v. *Mayor*, 6 N. Y. 179, is commented upon and approved, and it is said that, although this case was decided before the adoption of the code and under the equity practice, there is no question but that its doctrine must be applied to actions under the code.

THE ASSIGNMENT OF PART OF A CONTRACT OR FUND.

But it is urged that a part only of the contract could not be assigned without the consent of the county and that it is not liable to the plaintiff unless it assented to the assignment; that

mere notice is not sufficient. This question seems to us to be settled in the cases already cited. In *Field* v. *Mayor*, 6 N. Y. 179, portions of the contract had been assigned to four different parties, and the assignor still retained a balance. Mere notice was there held sufficient to charge the defendant without any assent. Running the cases over we find that the greater part of them were cases where a part only of the contract was assigned.

In Indiana it has been held in a number of cases that part of a contract may be assigned without the assent of a debtor.

McFadden v. *Wilson*, 96 Ind. 253.

In *Harrison, Receiver* v. *Wright*, 100 Ind. 515, on page 531, it is said:

"The rule that a chose in action, or a part of a chose in action, can not be assigned, is the rule of law, but it is not the rule in equity, and still less is it the rule under modern statutes, which, as in this State, expressly authorize the assignments of choses in action, and direct that all action shall be prosecuted in the name of the real party in interest. Under these statutes, no good reason is apparent why the assignee may not maintain an action at law."

"If, by the assignment, the assignee acquires a legal right, it is "by force of the statute, without regard to the assent of the debtor "or holder of the fund. If he acquires an equitable assignment "or right simply under the rules in equity, this right is independ- "ent of any assent by the debtor or holder of the fund."

See also *Indiana Manufacturing Co.* v. *Porter*, 75 Ind. 428.
Board v. *Jameson*, 86 Ind. 154, p. 165.
L. E. & St. L. R. R. v. *Caldwell*, 98 Ind. 245.
Wood v. *Wallace*, 24 Ind. 226.
Lapping v. *Duffy*, 47 Ind. 51.
Groves v. *Ruby*, 24 Ind. 418.
Hays v. *Branham*, 36 Ind. 219.

From these cases it will be seen that in Indiana at least an assignment of a part of a fund may be made without the assent of the debtor. And this is the rule elsewhere as well.

See *Laughlin* v. *Fairbanks*, 8 Mo. 367, p. 371.
Anderson v. *Van Allen*, 12 John's 343.
Russell v. *Fillmore*, 15 Vt. 130.

Moody v. *Kyle*, 34 Miss. 506.
Corser v. *Craig*, 1 Wash. C. C. 424.
Patten v. *Wilson*, 34 Pa. St. 299.
Lynn v. *Summers*, 7 Conn. 399.
Levee Comm'rs v. *Sherwood*, 21 Cal. 121.

The rule that a partial assignment could not be made without the consent of the debtor never amounted to more than that without such consent the assignee could not maintain an action in his own name. The assignment was valid, and could not be enforced in the name of the assignor.

In *Wescott* v. *Potter*, 40 Vt. 271, it is held that the assent of the debtor is necessary only for the purpose of enabling the assignee to maintain an action in his own name. It does not affect his right. "His right is the same without that assent except in the mode of remedy.

In *Corser* v. *Craig*, 1 Wash. C. C., 424, on page 427, the court says:

"It is not a long time since these objections which once existed to the assignment of choses in action have ceased to be more than formal. Courts of law, imitating the example of courts of equity, take notice of such assignments, and to every substantial purpose, give them effect, although they have not yet ventured to sustain an action in the name of the assignee."

But our statute authorizes the action in the name of the assignee, and so even this last formal objection is thereby obviated.

In that case part only of the claim was assigned.

In *Laughlin* v. *Fairbanks*, 8 Mo. 367, at page 371, it is said:

"With regard to the principles upon which the court acted, in determining the rights of the parties, the law seems now to be well settled that courts of law will protect the rights of the assignees to a chose in action, without requiring a party to resort to a court of equity, against all persons having notice of such assignment, either expressed or implied."

In that case a judgment had been assigned to three different parties, each getting one-third of it.

See *Moody* v. *Kyle*, 34 Miss. 506.
Canty v. *Lattermar*, 18 Cent. L. J. 30.
(By Supreme Court of Minn.) *Hart* v. *Dixon*, 5 Ky. Law Rep. 669., 18 Cent. L. J. 196.
By Court of Appeals, Ky. Oct. 17, 1883.

All of these cases of partial assignments only, were enforced and protected by law.

There is no reason in the nature of the controversy or of the remedy that requires a resort to equity. The assignor has filed a disclaimer, and there are no other contestants for the fund. There is no accounting to be had. It is admitted that if defendant had the notice which we claim to have given it, it then held sufficient money to protect us. There are no circumstances, we repeat, which would invoke equitable jurisdiction.

But there are yet other grounds upon which the legal jurisdiction will be upheld. Even at common law the complaint would show a good right of action in the plaintiff at law. It avers that the defendent consented to the assignment. This averment brings it within the strictest rule of the common law, and the action would be at law without regard to our statute. See *Wescott* v. *Potter*, 40 Vt. 271, and cases cited, *supra*.

ARE SUCH ASSIGNMENTS AND ORDERS AGAINST PUBLIC POLICY?

It was within the power of Meyers & Son to assign an interest in the contract with the county, together with a portion of the money due therefor. The fact that they were required to give bond for the performance of the work does not affect this right. Their bond remained in force as well after the assignment as before. They were still liable to the county upon their contract and bond, and the county was not injured by the assignment.

We cite the court to the following cases, some of which have been cited in support of other positions herein:

Field v. *Mayor*, 6 N. Y. 179.
Devlin v. *Mayor*, 63 N. Y. 8.
Dannant v. *Comptroller*, 77 N. Y. 88.

These are all the cases of partial assignments and cover this case. See also as in point:

Parker v. *City of Syracuse*, 31 N. Y. 376, p. 379.
Horner v. *Wood*, 23 N. Y. 350.
Taylor v. *Palmer*, 31 Cal. 240.
Crocker v. *Whitney*, 10 Mass. 319.
Cochran v. *Collins*, 29 Cal. 129, at p. 131.
Morse v. *Gilman*, 18 Wis. 373.

Gee v. *Small*, 12 Wis. 500.
City of St. Louis v. *Clemens*, 42 Mo. 69.
Ernst v. *Kunkle*, 5 Ohio St. 521.
Bradley v. *Root*, 5 Paige, 632.
Beal v. *Mowicker*, 4 Cent. L. J. 262.
Lutty v. *Woods*, 1 Mo. App. 167.
Pendleton v. *City of St. Louis*, 49 Mo. 565.
Brackett v. *Blake*, 7 Metc. 335.

The right to assign contracts with, or claims against, municipal corporations is recognized in Indiana.

Board v. *Jameson*, 86 Ind. 154.
Smith v. *Flick*, 95 Ind. 116.
Coquillard v. *French*, 19 Ind. 274, etc.

From *Horner* v. *Wood*, 28 N. Y. 350, on page 356, is so much in point that we quote:

"The agent, I am satisfied, is to award the contract to the parties "who will pay the highest price for the labor, and at the same time "give adequate security for the performance of their part of the "agreement. I know of no principle forbidding the transfer of the "equitable interest in a contract of that character. *The original "parties remain, of course, responsible to the agent or to the state, "notwithstanding the assignment;* but the profit and advantage of "the contract belongs to the assignees, they performing, as they "agreed to do, the engagement towards the state which the original "contractors took upon themselves."

That was a case in all its essential features like the one at bar. The state let contracts for its convict labor, and required a bond from the successful bidder for the performance of his agreement. An interest in the contract was assigned by the contractor, and to this assignment the same objections made in this case were urged. There is a full discussion of the subject, and the decision is in point here.

In *Taylor* v. *Palmer*, 31 Cal. 240, the same question was presented. There was a contract to improve the street made with the city, and bond was required and given, just as in this case. Over the same objections here urged, the contract was held to be assignable.

In *City of St. Louis* v. *Clemens*, 42 Mo. 69, the same doctrine is held.

City of Philadelphia v. *Lockhart*, 7 Pa. St. 211, was even more like this case in that the contract there was to *build a school-house*.

Munsell v. *Lewis*, 2 Denio, 224, was a contract for construction of a canal.

Devlin v. *Mayor*, 63 N. Y. 8, a contract to keep streets in order; *People, ex rel. Dannant*, v. *Comptroller*, 77 N. Y.; *Parker* v. *City of Syracuse*, 31 N. Y. 376 (see page 379); *Field* v. *Mayor*, 6 N. Y. 179; *Hall* v. *City of Buffalo*, 1 Keyes, 193 (see p. 196); *Brackett* v. *Blake*, 7 Metc. 335; *Devlin* v. *Mayor*, 50 How. 1; *Smith* v. *Flick*, 95 Ind. 116, are all in point, and hold such contracts or an interest therein assignable. We find no conflict in the authorities, at least in the later ones.

From the proposition that the contract is assignable, it follows as a corrolary that, unless there is a stipulation in the contract to the contrary, Meyers & Son can assign without first having obtained the consent of the defendant, and that such assent is not necessary to the validity of the assignment. If they have a right to assign, the assignment is valid without the consent of the board. If they have the right, they have the power to exercise that right, and they have no right if the exercise of it is dependent upon the will of the Board. The Board did assent in the case at bar. We say, therefore, that the power to assign without the assent of the Board is necessarily implied in the power to assign. When it is once established that they may assign, that their interest is assignable, then the other proposition follows of necessity. The conclusion would seem to us inevitable.

But the authorities are not wanting upon this point. The question arose and was discussed in nearly every one of the cases referred to above. In every case, so far as we have seen, nothing more is required to protect the assignee than simple notice of the assignment. *Williams* v. *Ingersoll*, 89 N. Y. 509, 518.

In *Philadelphia* v. *Lockhart*, 73 Pa. St. 211, nothing more was done by the assignee than to give notice to the "school controllers," and, upon argument and discussion this was held sufficient to charge the city. See 83 N. Y. 318, 329.

In *Parker* v. *City of Syracuse*, *supra*, delivery of the order to the comptroller was held "sufficient notice of the assignment to charge the city."

In *Field* v. *Mayor*, *supra*, the assignee simply sent copies of the

assignments by mail to the comptroller. The city was held liable upon this notice. So we might go through the cases.

In *People, ex rel. Dannant*, v. *Comptroller, supra*, it is said: "A "formal acceptance was not necessary, but *notice of the assignment* "*was sufficient*, and from the time of such assignment and notice "the city became the trustee of so much of the fund as was thus "assigned to the relator for his benefit, and had no right to convert "or misappropriate it. By paying it to Dutch, the city became "liable to the relator for the amount."

In *Hall* v. *City of Buffalo, supra*, on page 201, Ingraham, J., says:

"There can be no doubt that the assignees of such a claim might "give notice of the assignment to them, and recover the sum with- "out an actual acceptance by the debtor or the order or promise to "pay to the assignee."

And in the same case, on p. 196, Denio, J., says:

"I do not say that what was done by the comptroller amounts to "a contract with the holders of the orders in the nature of an ac- "ceptance or an engagement to pay them. It was sufficient to "charge the city with *notice* of the orders and their contents. I do "not suppose that any privity of contract is established between the "holders of these orders and the city. *It is sufficient if these hold-* "*ers, by their transactions with Baker and the notice to the corpora-* "*tion, had acquired an equitable interest in the fund.*"

When the plaintiff in this case had given notice of its contract and had performed all that work, did it not have an interest in the fund which defendant was not at liberty to disregard?

In *Brackett* v. *Blake*, 7 Metc. 335, an assignment by an officer of moneys to be earned under his contract with the city was held sufficient upon mere notice without acceptance.

So we do not find a single case where it is held that the consent of the corporation (the debtor) is necessary to the validity of the assignment, or is needed to fix its liability to the assignee.

There is nothing in the argument that it is contrary to public policy to permit such assignments. The work is to be done under the supervision, and to the acceptance of, the architect and agent of the county, and, as is well said in some of the cases, "It is *his* skill and genius that gives form and excellence of performance to the work." The defendant does not have to accept the work un-

less it is done according to contract. As we have seen, it still holds the original contractor liable upon his bond and loses none of its rights against him. It is not injured. In one way it is benefited. It gets an additional party to whom it may look for performance according to contract, if it so elects.

But further than this. If it had desired to prevent the assignment of an interest in that contract without its consent, nothing was more easy. It could have inserted a provision to that effect in the contract. See *Deffenbaugh* v. *Foster*, 40 Ind. 382.

There is, then, no hardship in the rule for which we are contending. The rule is a good one, and is not peculiar or unusual. An illustration of its application is found in the case of *Beirne* v. *L. E. & W. Ry*, 11 Rep. 748. We quote from the statement of the case there given:

"Action was for wages earned by W. and assigned to plaintiff, "who notified the treasurer of the company by mail, and in a few "days received from the office of the treasurer a printed circular, "addressed to him, stating that assignments against the pay of em- "ployees would not be honored. Afterwards defendant paid wages "to W. *Held*, that was sufficient notice of the assignment to the "company, and payment thereafter to the assignor was no defense "to the action by the assignee."

In *Norton* v. *Taylor*, 1 Hill, 583, it is said:

"The order was an equitable assignment of the rent in question "with notice to Norton, who was bound to pay it according to the "terms of the order, *whether he had accepted it or not.*"

See also *Lowery* v. *Stewards*, 25 N. Y. 239, top of page 242.

The court will remember that this is not a case of a simple draft or bill of exchange with no interest in the contract. This contract is itself an assignment and vests an equitable interest without any acceptance.

But, of course, until it receives notice of the contract it would be protected in any payments made to the original contractor.

It can not escape liability to plaintiff *after notice* by refusing its assent to the contract, but, on the other hand, it will be protected in all payments made to the asignor *before such notice.*

When is it charged with notice? That becomes the important question. The notice was thrice given, each time long anterior to the time when the work was done, and while the county held ample

funds. It had possession of the building when we did the work. It was not done of nights, the workmen leaving with daylight, leaving no indice of who they were. In the first place it will be well to remember that the Board of Commissioners has double functions, It is a court, and when acting in its judicial capacity must speak by the record. On the other hand, it is a corporation, and is subject to the same rules and liabilities as other corporations. Its contracts may be shown by parol, and it may act by agents. It is, in a word, when acting merely as a corporation (as is the case as to its contracts) on the same footing as other corporations. Its rights and liabilities are no greater or less.

We believe that we can not better conclude this branch of the argument than with a short quotation from the recent case of *The People* v. *Spicer*, 1 N. E. Rep. 680, at p. 681:

"A fair and honest claim against a municipal corporation is "entitled to the same rules of construction which would obtain in "the case of a similar claim against an individual, and neither "should be subjected to a strained or technical interpretation of the "law for the purpose of defeating them."

We say there is no error herein, and ask an affirmation with costs.

LEVI RITTER.
E. F. RITTER.
B. W. RITTER.

INDIANAPOLIS, IND., January 2, 1889.

In the Supreme Court U. S.
FILED
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JAMES H. McKENNEY
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Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 295.

DELAWARE COUNTY

vs.

DIEBOLD COMPANY.

REJOINDER BRIEF BY APPELLEE.

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1. It is said in the reply of plaintiff "That the statement that the County Board discharged Meyers in the spring of 1883, is not true." The Record (page 27) says: "It further appeared upon the trial of said cause that in the spring of 1883, after the work upon said jail had progressed for some time, but before any of the iron or steel work had been done therein, the said Board of Commissioners defendant refused to pay any more money to said Myers & Son upon said jail, but put one John Perry in charge thereof, as its superintendent, under an arrangement that he should pay for materials furnished and work done and expenses incurred in and about the erection of said jail, upon written orders drawn upon the County

by said Meyers & Son, to be approved by said Perry and audited by the said Auditor and paid by the Treasurer of said County and charged against said Meyers & Son."

Possibly it would be more accurate to say that in the spring of 1883 the County took possession of the work of constructing the jail, put Perry in charge of the same as superintendent, and did not discharge Meyers & Son from their obligation under the contract nor on the bond, but did charge him thereon for the work that the County thus did upon the jail. One thing is certain: Meyers did not have charge of the work; Meyers did not pay his hands; he had nothing to do with it only to give orders that had to be approved by Perry, and the County paid for the work done from that time forward. The County did not forfeit the contract because of the assignment of any portion thereof, nor because Meyers & Son did not pay for work and material, but took charge of the work to insure the pay to such persons. The important fact in this case is, that the County took charge of the work and had charge of the construction of the building, and assumed to pay for material and labor put therein, and that they had charge of it during all of the time when the Diebold Company did the work, as set out in the plaintiffs' complaint herein, but did not pay the Diebold Company according to the agreement made when Perry was put in possession. This brings the case clearly under the rule laid down in the case of *The Brass Foundry* v. *The Board of Commissioners of Parke County*, 115 Ind. 234.

2. Attorneys for appellant are mistaken when they say that we do not question the proposition made by them that notice to the Auditor was not notice to the County Board. We said in our original brief (pages 4 and 5), after quoting the statute requiring persons having claims against the County to file such claims with the Auditor, to be by him presented to the Board of County Commissioners, that "This section makes the Auditor the agent to present the claim, and prescribes that he is the only medium to get it before the Commissioners." That argument is brief, but it covers the whole case. The statute expressly requires claimants to file their claims with the Auditor. It is claimed that notice that the contract had been assigned to the Diebold Company is not the kind of a claim that is thus required to be filed with the Auditor and by him presented to the Board. The language of the statute

is, "Whenever any person or corporation shall have any legal claim against any County, he shall file it with the County Auditor, to be by him presented to the Board of County Commissioners." The Diebold Company had a claim against Delaware County. It had become the assignee of a contract made with the County and Meyers & Son. Under the assignment, it assumed to do certain work for the County, and was entitled to receive $7,700 from the County that would otherwise be due to Meyers & Son. It was required to give notice to the County that it would do the work instead of Meyers & Son, and was to receive the pay instead of Meyers & Son. Surely this law is not limited to any particular kind or nature of claim. Nor does it prescribe that the claim shall arise in any particular manner, but in whatever way the claim of the Diebold Company was created, it was proper to present it in this way to the notice of the Board of Commissioners.

We assume, and the trial Judge so instructed the jury, that notice given to the Commissioners in session was sufficient; but this does not make void the statutory mode of bringing the subject to the attention of the Board, as the trial Judge also instructed the jury. The validity of such a mode of bringing any kind of a claim before the Board of County Commissioners has never before been questioned in Indiana; or, at least, the question has never been carried to the Supreme Court for determination. And, therefore, a statement of the statute is a complete and full argument of the proposition.

3. In the reply brief, attorneys for plaintiff in error say, "Our position as to the non-assignability of Government contracts in whole, where the Government is paymaster, is not assailed." Of course not. The case at bar is not of that kind. Sovereign power and authority may demand to be treated with certain dignity. The creature, whether individual and personal, or corporate and incorporeal, may take no license from this rule of law to assume the dignity of its creator or governor. In the *Board of Commissioners* v. *Ritter*, 90 Ind. 362, on page 370, the Court says: "We have not discovered anything in the statute set out relating to the Board of Commissioners or its powers and duties, which would seem to preprevent it from contracting within its legitimate sphere, as other corporations may contract." So that for all purposes of making contracts, being bound by notice, and doing other duties in the

matters and things in controversy in this case, the Board of Commissioners are merely a corporation. The Board is merely the County agent to audit its claims, allow the same, and to do its business. It may allow claims, and most generally does, without proof and on the personal knowledge of the Board of Commissioners. The Board of Commissioners is not a State Court, although, for the convenience of transacting the County business, the Legislature has prescribed the rules for its government that are applicable to Circuit Courts. A claimant may disregard its action, and without appeal, if his claim has been rejected, bring an original action thereon in the Circuit Court. See *Brass Foundry, etc.*, v. *Board of Commissioners of Parke County*, 115 Ind. 234. The law prescribes certain rules to govern the conduct of Boards of Commissioners in every department of its action: how it may open a highway, how it may take care of paupers, how it may purchase stationery, allow claims, and provide for criminals. None of these powers and duties of County Boards constitute these Boards State Courts, nor are they advanced to the dignity of sovereign States simply because they have power to levy taxes for County purposes.

4. The prominent reasons given why certain acts are said to be against public policy are that the act is opposed to the public good or convenience, or is in conflict with the wants, interests or sentiments of the people, or is repugnant to the morals of the people, or tends to corrupt public officers and lead them to neglect their public duties, or prevents the Government or individuals from discharging the duties they owe to the world of mankind. What one of these principles could be violated by allowing the assignment in whole or in part of a contract to erect a County jail? The erection of such jails is a duty the County Commissioners owe to the public. They are for the public good and convenience. The contract was not let to Meyers & Son because of their individual skill and ability to personally do every part and branch of the work. The law requires no such qualifications; indeed, it is a matter of public knowledge that no one man or firm are skilled in every branch of work required to be done. The work was to be done under the direction of the architect who was the agent of the County, and the contract was let to Meyers & Son because they were the lowest responsible bidders and because they executed a bond, in form at least, as required by the law. The contract was

not abrogated by Meyers & Son assigning any particular portion of it, nor was the bond weakened; but in both of these respects additional strength was given to them by the additional responsibility assumed in the assignment by the Diebold Company. The County was to get all the security and every advantage stipulated in the contract and bond. No public officer was tempted thereby to neglect his duty or to defraud the County.

Let us look at the other side a moment. If the assignment is to be held void then we have public officers standing by with notice that the Diebold Company is doing the work for the County, expecting to get its pay from the County, and with no obligation from Meyers & Son to otherwise pay them a cent; and these public officers are permitted to see this work going on, to receive and retain the result of this labor and expenditure for the benefit of the County, and still they may refuse to pay the assignee. Such a rule of law is a temptation to dishonest architects, County officers and contractors to divide the profits thus obtained, and to receive buildings and work that ought not to be received, greatly to the fraud of actual laborers. Indeed, in the case at bar, such a state of facts existed, according to the contention of the plaintiff. Let us look at that a moment. It was conceded upon all hands that the Diebold Company did the work, that it was worth the $7,700, that the County at all times had in its hands, after May, 1883, sufficient money to pay said Company. With this state of affairs existing, the County put its own superintendent, John Perry, in charge of the work as superintendent, agreeing that no money was to be paid out except upon his approval, and then only for labor and materials actually furnished. And yet if there was any money paid out more than $784, it was paid out in violation of this regulation and before the work was done. In violation of this arrangement, while the Diebold Company was doing its work, twenty days before the completion of the jail (on the 5th day of September, 1883), the County Commissioners settled with Meyers & Son, undertook to defraud the Diebold Company out of all pay, paid some uncertain amount, estimating that $4,500 should be charged for failure to complete the work in time, contracted that if Secrets could be cheated out of his money the same should be paid over to Meyers & Son; so that the trial Judge might well have remarked, as he did in his instructions (page 30 of the Record), "the position is made

on the part of the plaintiff that that was not a good faith settlement, and did not, in fact, embrace a full payment to Meyers; that, notwithstanding the settlement, there still remained something due to Meyers. Of course, if the settlement was a sham in intent as between the parties to the settlement, then it has no influence against the rights of the plaintiff in this suit."

Is there any force in the argument of our opponents that because mechanics' liens are not allowed to be placed upon public buildings, therefore no assignment of contracts should be allowed? We think not. What are the grounds of public policy upon which mechanics' liens are held to be void? The controlling reason given in all cases is, that such a rule would permit public buildings to be sold at Sheriff's sale, and thereby diverted from the public use. See *Fatout* v. *Board of Indianapolis*, 102 Ind. 223; *Leonard* v. *City of Brooklyn*, 71 New York, 498, and the Indiana cases cited by appellant's counsel in their brief. There is no conflict in the authorities, but all hold that mechanics' liens can not be enforced against public buildings because of public policy. This is one of the strong reasons why public policy should allow the assignment in parts of contracts to build them. By this means the public can not be disturbed in the possession of the building. The men who do the work and furnish the materials will be sure to get their pay. The County can not be compelled to pay anything extra for the building, and all fraudulent combinations between County officers, architects and contractors are effectually prevented. Public policy requires that such assignments be upheld, even if the assignment, as a whole, was disallowed. The brick work, the stone work, the wood work and iron and steel work can thus be let to skilled men at lower figures, because their pay is sure.

It is a fact of public notoriety that all contractors, in some manner, must get men skilled in each of these specialties to do that particular branch of the work. The public is interested that all parties are equally protected, because thus it gets cheaper and better work. Because a bond is given is no reason why the sub-contractor should be deprived of the safety of an assignment of the contract to the extent of the work he does. The County officers may combine with contractors, let the contract to a rascal who makes a low bid, accept a worthless bond, divide the profits, and

let the workmen go unpaid. This can not be done while partial assignments are upheld.

Mitchell, Judge, in *Brass Foundry* v. *Board of Commissioners*, 115 Ind., said that "The doctrine of *ultra vires* does not absolve municipal corporations from the principles of common honesty." We carry forward the line of reasoning and say that the doctrine of *public policy* does not relieve municipal corporations from the obligations resting upon individuals to use every means consistent with the public good to see that laborers and material men, who construct buildings that the corporations get the benefit of, shall receive their pay therefor. Public policy does not expend its force in seeing that public officers have but little to do in discharging the duties of public offices.

If the Diebold Company had done this work for a private individual, under the circumstances surrounding this case, the private individual would be estopped from denying that he consented to the contract of assignment, or that there would arise an implied contract for work and labor done and material furnished at the instance and request of the debtor. The only case relied upon for the support of the position of appellant's counsel is the *Appeal of the City of Philadelphia*, 86 Pa. St. 179. That case quotes and approves the case of *Philadelphia* v. *Lockhart*, 23 Pa. St. 211, which was an assignment of the whole of a contract. The case seems not to have been well considered. The City claims never to have had notice or that there never was filed with it a copy of the assignment, so that they could ascertain the amount of the assignment; that it was an uncertain portion, requiring an accounting and settlement with other and different persons who also had an interest in the contract. On page 181 the court says, "That which the latter assigned to Quinn was an uncertain and undetermined portion in dollars of the sum to be paid. It is true it was susceptible afterwards of being determined by agreement between the parties to the assignment; yet they were liable to disagree as to Quinn's rights under it, and, in fact, did disagree. They disagreed as to the object of the assignment, the amount of the work done by Quinn, the sum to be paid him, and the amount due him upon completion of the work."

We remark that none of these qualities belong to this partial assignment. It was for a definite portion of the work upon which

separate estimates had to be made, and the amount of pay to be received was $7,700. The reason assigned in the above case for the decision is expressed on page 182, as follows: "The probable and natural effect of holding a municipality liable to each assignee would subject its officers to vexatious annoyance and the City to litigation and costs." The opinion in this case is entitled to no more weight than the reason given for it. The history of that very case, as well as in the case at bar, shows that by disregarding the assignment both parties were drawn into expensive litigation, and became agents, whether intentionally or not, of perpetrating a great wrong upon the persons that constructed the buildings. Again, it is said, in the case above quoted, on page 182, "There is no doubt but that, as between individuals, this rule prevails in equity. Whether it should be so held against municipal corporations is now the question. It does not appear to have been decided by this court, nor has the research of counsel been able to cite the decision of a court of last resort in which it was so held." It is sufficient proof that the case was not a well considered case to recall the fact that more than twenty-five years before this case was decided and before the court asserted that no cases bearing on the subject could be found, the case of *Field* v. *The Mayor of New York*, 6 N. Y. 179, had been decided. That was a case wherein one Bell had been employed to do the printing for the City of New York, and had made assignments of three different amounts of the pay that would be due him, and made the assignments before the work was done or the pay could possibly fall due. Field merely gave notice that he held this assignment, and the court said (page 186):

"The assignment of Bell to Garread was valid and operative as "an agreement, by which Garread and his assigns became entitled "to receive payment of the bills in question when the same should "become due, to the amount indicated in the assignment, subject "to the two prior assignments. It did not operate as an assign- "ment '*in praesenti*' of the choses in action, because they were not "in existence, but remained in possibility merely. A possibility, "however, which the parties to the agreement expected would, and "which afterwards did, in fact, ripen into an actual realty, upon "which, by force of the agreement, an equitable title to the benefit "of the bills thus mature and due, became vested in the respondent "as assignee of Garread."

And on page 187:

"Whatever doubts may have existed heretofore on this subject, "the better opinion, I think, now is that courts of equity will sup- "port assignments, not only of choses in action, but of contingent "interests and expectations, and of things which have no present "actual existence, but rest in possibility only, provided the agree- "ments are fairly entered into, and it would not be against public "policy to uphold them. Authorities may be found which seem to "incline the other way, but which upon examination will be found to "have been overruled, or to have been turned upon the question of "public policy."

The case of the *Appeals of the City of Philadelphia*, 86 Pa. St., was decided at the January term, 1878. At the November term, 1875, the cause of *Devlin* v. *The Mayor of New York* was decided, more than two years before the former case. The last case arose upon a contract made with one Hackley to sweep and clean the streets of New York, which was assigned in different parts to different persons. And the court says, on pages 15 and 16:

"There was certainly no reason why there should not have been "a recovery of the moneys actually earned, even if the contract had "been terminated for every other purpose. But it is palpable that "the city had no thought of objecting to the further prosecution of "the contract for the reason that it had been assigned, or that it "was not assignable. The question, however, whether the assign- "ment by the original contractor *terminated the contract*, or author- "ized the refusal of the city longer to be bound by it, still remains "to be considered, as the waiver has not been found by the referee. "An assignment by the contractor of the amounts which would "have become due from the city from time to time, made before the "doing of the work or the performance of the conditions upon "which the payments depended, would, under the liberal rule per- "mitting the assignment of choses in action now prevailing, be "valid. Expectancies, as well as existing rights of action, may be "assigned, and the rights of the assignees will be protected and en- "forced at law. (*Field* v. *Mayor, etc.*, 2 Seld. 179; *Hall* v. *Buffalo*, "2 Abb. Ct. of App., Dec. 301.) An assignment may include *all* "*contingent and incidental benefits or results of an executory contract*, "*as well as the direct fruits or earnings under it*, and thus entitle the "assignee to the damages resulting from a violation of its terms.

"The right of action for a breach of the contract, resulting in pe-
"cuniary loss to the contractor, would survive to the personal rep-
"resentatives of the aggrieved party, and that is one test of the
"assignability of contracts and choses in action. (*Byxbie* v. *Wood*,
"24 N. Y. 607; *McKee* v. *Judd*, 2 Kern, 622; *Zabriskie* v. *Smith*,
"3 id. 322.)

"In principle it would not impair the rights of the assignee, or
"destroy the assignable quality of the contract or claim, that the
"assignee, as between himself and the assignor, has *assumed some*
"*duty in performing the conditions precedent to a perfected cause of*
"*action, or is made the agent or substitute of the assignor in the per-*
"*formance of the contract.* If the service to be rendered or the
"condition to be performed is not necessarily personal, and such as
"can only, with due regard to the intent of the parties and the
"rights of the adverse party, be rendered or performed by the orig-
"inal contracting party, and the latter has not disqualified himself
"from the performance of the contract, the mere fact that the indi-
"vidual representing and acting for him is the assignee, and not the
"mere agent or servant, will not operate as a rescission of, or con-
"stitute a cause for, terminating the contract. Whether the agent
"for performing the contract acts under a naked power, or a power
"coupled with an interest, can not affect the character or vary the
"effect of the delegation of power by the original contractor."

It is conceded that a definite portion of the pay due for work already done by the contractor can be assigned, and that mere notice is sufficient to hold the debtor liable. There are many stronger reasons why an executory contract may be assigned in parts, for, in the latter case, the debtor has notice that the assignee is to do the work and expects to expend money and labor in performing the work, upon the faith that when it is done he shall receive the pay that would be due the assignor if he did it. In the former case, the contractor might leave the laborers and material men unpaid and assign the pay they had earned to a stranger, and thus work a fraud. But by permitting the assignment of a portion of an executory contract, no fraud could possibly result. A notice that the assignor is going to do the work with the expectation of receiving the pay therefor from the County, should be much stronger in law and equity than a notice that he has an assignment of a definite portion of the pay for other people's labor.

The principles of common honesty can not be at war with public policy. It is said by Greenwood, in his admirable work on Public Policy In The Law of Contracts, page 356, rule 299: "A contract to do work for municipal corporations, or transferring the convict labor of the state, is assignable." This is supported by numerous authorities by the author cited, and is the law.

5. It is contended by counsel for plaintiffs in error that the seventh clause of the contract between Meyers & Son and Delaware County prohibits the assignment of the contract. (See Record, page 8.) The clause referred to reads as follows: "The County will not in any manner be answerable to or accountable for any loss or damages that may happen in or to said works, or any part or parts thereof, respectively, or for any of the materials or other things used and employed in finishing and completing the said works." This clause makes provision that they will not be responsible for any claims in the nature of mechanics' liens and for negligence of the contractor; it goes no farther. If the contracting parties had intended the clause to prohibit assignments, it would have been very easy for them to have said that neither the whole nor any part of this contract shall be assigned without the consent of the Board of Commissioners in writing upon the back thereof first obtained; which is the usual form of stipulations against assignment of contracts, and which stipulations are necessary to prevent assignments in Indiana. See *Deffenbaugh* v. *Foster*, 40 Ind. 382, cited on page 29 of our brief.

6. It is contended in the reply brief that the action was not legally commenced until Meyers & Son were made parties, which was done after the removal of the cause unto the United States Court, and therefore, there was no cause to remove. In addition to what is said in our brief upon that subject, we wish further to remark that in Indiana the courts have construed the law very liberally as to making assignors parties who are merely nominal parties, for the purpose of answering as to their interest in the contract. The law requires the suit to be brought in the name of the real party at interest; therefore, where the assignee commences the suit in his own name, the suit is commenced for all the purposes that may be adjudicated in the case. In the case of *Morrison* v. *Ross et al.*, 113 Ind. 186, the suit was commenced by the assignee without making the assignor a party at all. The defendant first demurred

for want of proper parties, then answered that the assignor was in fact the real party at interest. The cause was submitted to the jury and tried. After the jury had returned a verdict, the assignor came in and filed an answer disclaiming any interest in the matters at issue in the suit, and the court says, on page 195: "By permitting "Johnson H. Ross to enter his appearance as a defendant, and to "answer disclaiming any interest in the subject-matter of the ac- "tion, after the return of the verdict, all was in effect accomplished "that would have been by making him a defendant in the first in- "stance. He thereby voluntarily became precluded from there- "after asserting any interest in the matters in controversy. How- "ever unusual or informal the proceeding may have been, no injury "from it resulted to Mrs. Morrison, so far as we are able to per- "ceive." Meyers & Son appeared in the United States Court and filed an answer disclaiming any interest in the matters at controversy. See Record, page 13.

We await the judgment of the court.

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APRIL 10, 1889.